90-1570

RECORD NO.

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IN THE

Supreme Court of the United States

October Term, 1990

ELTON EUGENE GUNTER,

Petitioner,

v.

VIRGINIA STATE BAR, ex rel, THE SEVENTH DISTRICT COMMITTEE and BILLY J. TISINGER, ESQUIRE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Questions Presented

1. Whether the respondent denied petitioner due process and equal protection of the laws in violation of the Fourteenth and Fifth Amendments of the United States Constitution by refusing to grant him a hearing before the Seventh District Committee (the Committee), a right that is accorded to virtually everyone in similar circumstances, solely because a member of the Virginia State Bar Disciplinary Board (the Board) was the original complainant?*

* Richard Voorhis, Esq., Assistant Bar Counsel of the Virginia State Bar, informed counsel herein on March 26, 1991 that this case is the only case where such a hearing was denied.

2. Whether petitioner's due process and equal protection rights under the United States Constitution were violated by respondent's refusal to grant him a hearing and oral argument on certain motions in connection with this disciplinary proceeding that the respondent brought against him?

3. Whether the direct referral of petitioner's case to a three judge panel of the Circuit Court of the City of Winchester violated petitioner's due process and equal protection rights under the United States Constitution since it deprived him of a preliminary hearing, to which virtually all lawyers are entitled, before the Seventh District Committee, which hearing would have been private and confidential, whereas the three judge court was open

and public?

4. Since a professional license to practice law is deemed a property right, whether the order suspending petitioner from practice for one year under the circumstances of this case deprived him of property without due process of law?

5. Whether the procedures followed by respondent in the case are unconstitutional as applied to the petitioner herein?

6. Whether Gunter was deprived of his Sixth Amendment rights to effective assistance of counsel by virtue of the refusal by the Circuit Court to grant him oral argument with respect to certain motions and with respect to the Seventh District Committee in which he was

deprived of a hearing?*

*Since following a Committee hearing petitioner is granted the option to proceed before the Virginia State Bar Disciplinary Board, where confidentiality is continued, or before a three judge court, where all proceedings become public, the denial of a Committee hearing also deprived petitioner of this important choice.

The Parties

The parties in the Supreme Court of Virginia were Elton Eugene Gunter, named therein as appellant, and the Virginia State Bar, upon relation of the Seventh District Committee and Billy J. Tisinger, Esq., named therein as appellee.

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ORDERS AND OPINIONS BELOW

A copy of the opinion of the Supreme Court of Virginia is annexed hereto as part of the Appendix. Other relevant determinations are also annexed in the Appendix hereto.

JURISDICTION

(a) The order and judgment (opinion) of the Supreme Court of Virginia was rendered on the 11th day of January, 1991. It affirmed the judgment of a three judge Circuit Court of the City of Winchester, rendered April 30, 1990 which ordered Gunter's suspension from the practice of law "for a period of one (1) year ..." because, allegedly, he had knowingly, wrongfully, deliberately and intentionally misrepresented certain

material facts to two liability insurance companies in connection with his own personal injuries during two particular automobile accidents in which he was involved.

(b) The order and judgment of affirmance of the Supreme Court of Virginia was dated the 11th day of January, 1991, but a stay of the imposition of the suspension was thereafter granted on February 11, 1991, which stay shall continue until the 11th day of April, 1991, unless a petition for writ of certiorari is filed with this Court by that date, in which case the stay of suspension shall continue until a determination of such petition for a writ of certiorari.

(c) Jurisdiction to review the order and judgment of the Supreme Court of

Virginia is conferred under 28 U.S.C. Sec. 1257 and the rules of this court. The order staying the imposition of suspension of the Supreme Court of Virginia is annexed and made part of the Appendix hereto.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments and the Fourteenth Amendment, Section 1, of the United States Constitution are involved herein and annexed in the Appendix hereto.

The applicable provision of the Fifth Amendment is that:

"No person shall be deprived of life, liberty or property without due process of law."

The Sixth Amendment's applicable provision is:

" ... and to have the assistance of counsel for his defense."

The applicable provisions of the Fourteenth Amendment of the United States Constitution are:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Moreover, Virginia Code Sec. 54.1-3935 is relevant and will be furnished in the Appendix to this petition. In addition, Part 6, Sec. IV, Paragraph 13 of the Rules of the Supreme Court of Virginia (Paragraph 13) will also be provided in the Appendix to this brief.

Paragraph 13B of the Rules of the Supreme Court of Virginia, Part 6, Sec. IV, contain certain procedural safeguards

available to attorneys in proceedings before a District Committee. Paragraph 13 provides for a hearing conducted by a committee before it conveys a complaint to the Board and to a second hearing by the Board. Furthermore, Rule IV D of the Virginia State Bar Council Rules of Disciplinary Procedure for the District Committees (excerpted in Appendix) provides that an attorney who alleges noncompliance with Paragraph 13 is entitled to present evidence and argument in support of that allegation. Paragraph 13J(5) makes proceedings before the Committee and Board <u>confidential</u>.

Subparagraph (b)(5)(a) of Paragraph 13 was qualified by the language "Nothing herein shall be construed to prevent Bar Counsel or a District Committee from proceeding before a Circuit Court as

provided in [Sec. 54.1-3935] of the Code of Virginia,"[1] which quoted phrase was specifically deleted effective July 1, 1990. The said Virginia Code Section is provided in the Appendix hereto.

Finally, Disciplinary Rule 1-102 of the Virginia Code of Professional Conduct is also involved and will be excerpted in the Appendix hereto.

STATEMENT OF THE CASE

For approximately thirty years, Elton Eugene Gunter has been practicing

[1] Petitioner maintains that the qualification or condition as applied herein was in violation of the due process and equal protection rights of Gunter since there was no rational basis to invoke that qualification or condition and indeed it was arbitrary and capricious to do so. It has never been done before according to Assistant Virginia Bar Counsel Richard Voorhis.

law in the Commonwealth of Virginia, primarily in Winchester, Virginia, where he has specialized in trial and appellate practice.

This case arises out of a disciplinary proceeding which was instituted against petitioner by the Virginia State Bar pursuant to Part 6, Sec. IV, Paragraph 13 of the Rules of the Supreme Court of Virginia, (hereinafter sometimes referred to as Paragraph 13) and Section 54.1-3935 of the Code of Virginia, 1950, as amended; both of which are provided in the Appendix hereto.

By letter dated May 5, 1987, from the Virginia State Bar, Gunter was notified that this case had been referred to the Seventh District Committee for investigation. More than two years later, another letter dated June 12, 1989,

sent by the Virginia State Bar advised Gunter that the Seventh District Committee had determined to send the case to a three judge court and that he would, therefore, be deprived of a hearing to which virtually every other attorney under similar circumstances would be entitled. Both letters are provided in the Appendix hereto. No hearing was afforded petitioner prior to this aforesaid determination to deprive him of a hearing before the Seventh District Committee, nor does the record reflect what had transpired during the two-year hiatus between referral of the charges to the District Committee and the unexpected and inexplicable decision to send the case directly to a three judge court.

The specious rationale articulated in the letter of the Bar of June 12, 1989,

explained that the complainant, Billy J. Tisinger, was a member of the Virginia State Bar Disciplinary Board and that the Board could not for that reason hear the case. There was no mention of a possible recusal of Mr. Tisinger, nor was there any indication that the petitioner would be, at least, granted a hearing and provided with discovery as to what motivated this decision after such a long period of time.

After receipt of the June 12, 1989, letter, petitioner contacted the Virginia State Bar in an effort to determine why he had not been afforded the right to a hearing and other rights which are provided by Part 6, Section IV, Paragraph 13, of the Rule of Court, which was later reduced to writing in Gunter's letter to the Virginia State Bar of June 14, 1989, printed in the Appendix hereto. By

letter of June 13, 1989, from the Virginia State Bar, he was advised that "Paragraph 13(c)(5)(b)(i) of the Supreme Court Rules allow a District Committee to send a case directly to the Board". It further explained that "when the Committee determined that the Board could not hear the matter, they determined to proceed under Section 54.1-3935 of the Code of Virginia." This letter is reproduced in the Appendix hereto.

Gunter objected to this procedure in a letter by his attorney, dated July 5, 1989, because it clearly appeared to be discriminatory and singular to his

particular case.[2]

Furthermore, Gunter enumerated specific objections to the aberrant procedures being employed in his particular case and noted that Rule IV D of the Virginia State Bar Council's Rules of Disciplinary Procedure for District Committees provided that a respondent was entitled to present evidence and argument to a District Committee addressed to its failure to comply with the Committee's Rules and that such noncompliance had so prejudiced his rights as to deny him a constitutional right to due process. That letter is contained in the Appendix

[2] Upon information supplied by the respondents, there is no similar situation where this procedural bypass has occurred. Absent a clear showing that the attorney involved is an imminent threat to the public or for some similar reason, the action is incredible.

hereto.

On July 17, 1989, in a letter from the Virginia State Bar reproduced in the Appendix hereto, Gunter was advised that he could request reconsideration of the action of the District Committee which he, of course, did by his attorney's letter of August 23, 1989. He was advised by letter of September 19, 1989, from the District Committee that his request for reconsideration had been denied. All of these letters are provided in the Appendix hereto. Petitioner was never afforded an opportunity to present evidence and argument to the Committee that noncompliance with the Rules had resulted in a denial of due process of law as well as the equal protection of the laws, as provided by Rule IV D of the Virginia State Bar Council Rules of Disciplinary

Procedure for District Committees.

On January 30, 1990, the Virginia State Bar filed a complaint in the Circuit Court of the City of Winchester, alleging that E. Eugene Gunter, Esquire, the petitioner herein, had engaged in certain misconduct in violation of the Virginia Code of Professional Responsibility. A three judge court was designated to hear the case, but petitioner filed his Answer to the Complaint, together with a Motion to Dismiss or Remand the Complaint, alleging various deficiencies in the proceedings prior to referral of the case to a three judge court.

In addition, Gunter filed a Motion for Leave to Conduct Discovery concerning the facts alleged in the Motion to Dismiss or Remand, since petitioner maintained that the procedures employed were in

violation of his constitutional rights to due process and equal protection of the laws. Included in this motion to dismiss or remand was a prayer that Gunter be afforded a hearing on the motion at which time he would be allowed to present evidence in support of this motion.

The three judge court by letter opinion dated March 14, 1990, rejected and denied the foregoing motions without so much as a hearing. That letter is furnished in the Appendix hereto. On March 29, 1990, the three judge court convened for a hearing on the complaint itself, at which time petitioner renewed his Motion to Dismiss or Remand as well as the Motion for Leave to Conduct Discovery. That tribunal, however, adhered to its previous decision denying those motions, again, without affording a hearing.

Bypassing the procedural avenues which virtually every other attorney in the state was afforded before getting to the three judge court, the three judge tribunal conducted a hearing on the merits of the complaint and subsequently determined that Gunter had engaged in misconduct as defined in the Virginia Code of Professional Responsibility and that his license to practice law should be suspended for a period of one year.

In the Supreme Court of Virginia, the petitioner raised questions as to whether the Circuit Court had erred in denying his Motion to Dismiss or Remand and whether the Court erred in denying his Motion for Leave to Conduct Discovery.

The aforesaid assignments of error in the court below are embodied in the constitutional questions presented to this

court, since procedural rights afforded to every other attorney were denied to petitioner.

ARGUMENT

POINT I

The Virginia Supreme Court is either unaware or indifferent to this Court's rulings that proceedings to disbar or discipline an attorney are not "civil" in nature as the court below seems to think, but are "quasi-criminal in nature" as this Court has held in the leading case of In Re Ruffalo, 390 U.S. 544 (1968). The determination, therefore, of the Supreme Court of Virginia that Petitioner's constitutional rights were not violated under the due process and equal protection clauses of the Fourteenth Amendment by denying Gunter the rights and hearings accorded to virtually every other attorney, are even more disturbing and puzzling.

A.

An attorney has a right to

procedural due process which includes fair notice of a hearing. The Supreme Court of the United States has characterized disbarment proceedings as "adversary proceedings of a quasi-criminal nature," and has ruled that a lawyer is, therefore, entitled to procedural due process, including the right to a fair notice of the precise nature of the charges against him. This tribunal has held in In Re Ruffalo, 390 U.S. 544, (1968) reh. denied, 391 U.S. 961 (1968), that:

> "Disbarment ... is a punishment or a penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which includes fair notice of the charges."

The State of Virginia has deprived petitioner of these procedural rights to which virtually every other attorney is entitled, such as a private and

confidential hearing before a District Committee and an opportunity to present evidence at such a hearing. This would precede referral, if at all, to a three judge court. (Cf. Ward v. Village of Monroeville, 409 U.S. 57 [1972].)

If petitioner had received the usual hearing before the Seventh District Committee and it had found reason for discipline, petitioner would have had the option to have his matter referred to the Disciplinary Board or a three judge court.

Before the Board, confidentiality would have continued, but not so before the three judge court. Thus, Gunter was also deprived of this election which also impacts on his due process and equal protection rights.

Moreover, a full adversary hearing is provided for before the District

Committee with the right to compel the attendance of witnesses and the right of cross-examination. This would have enabled petitioner to confront witnesses not only at the Committee hearing, but for use at the plenary hearing required before either the Board or the three judge court.

In addition, the court below upheld the deprivation of Gunter of any discovery as to why this procedure was bypassed in his particular case even after he was notified that he would be accorded these rights. After a hiatus of over two years elapsed, he unexpectedly, inexplicably, and shockingly was notified that he would not be accorded this procedural opportunity and that the matter would be referred directly to a three judge court.

Since there was about a two-year hiatus before petitioner was informed that

he would not be given the usual hearing before the District Committee, it is obvious that no one considered him a danger to the community or as a person who should not be practicing law at all. (See Part 6, Sec. IV, Paragraph 13, (5)(b) of Virginia Rules in the Appendix hereto.)

This meant, of course, that Gunter was deprived of a private and confidential hearing before a local committee of his peers, and the referral to the three judge bench meant that the proceedings would be made public immediately with all the embarrassment, obloquy and disgrace that entailed. On top of that, he was not even afforded a hearing with respect to why the procedural bypass had been imposed without his consent or knowledge.

The rather specious excuse that Billy Tisinger was a member of the

Disciplinary Board is hardly convincing in view of the fact that Tisinger could have recused himself, another person could have been vouched in his place, or any other number of alternatives could have been invoked.

Even more disturbing is the fact that no particulars or discovery were granted to him as to why this had occurred, nor was he ever given an opportunity to be heard prior to the trial on the merits before the three member panel of judges.

While petitioner was given notice, in general, of the charges against him, he was not given an opportunity to defend himself in the same manner that virtually

every other attorney was accorded.[3]

Even in civil litigation, the Supreme Court has held and has reaffirmed that every party is entitled to due process of law and to reasonable notice affecting his interest. Our highest court has made it clear that procedural due process is absolutely guaranteed to all

[3] If petitioner had received the usual hearing before the Seventh District Committee and it had found reason for discipline, petitioner would have had the option to have his matter referred to the Disciplinary Board or a three judge court. Before the board, confidentiality would have continued, but not so before the three judge court. Thus, Gunter was also deprived of this election which also impacts on his due process and equal protection rights. Moreover, a full adversary hearing is provided before the District Committee with the right to compel the attendance of witnesses and the right of cross-examination. This would have enabled petitioner to confront witnesses not only at the committee hearing, but for use at the plenary hearing required before either the board or the three judge court.

litigants. (See Peralta v. Heights Medical Center, Inc., ___ U.S. ___, 108 S. Ct. 896, 99 L. Ed. 2d 75, ___ [1988].)

Furthermore, the Supreme Court has held that it is "fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner" (emphasis ours) (Fuentes v. Shevin, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. [1983], reh. denied 409 U.S. 902, 93 S. Ct. 177, 34 L. Ed. 2d 165 [ ]).

The Supreme Court has even held that a waiver of rights to a hearing and notice may not be valid where there is a great disparity in bargaining power and the person waiving receives nothing for the cognitive provision ...". (Overmayer v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124.) In similar situations,

where a debtor is to be deprived of property, the Supreme Court has held that the procedure is unconstitutional if an opportunity for a hearing and proper notice is not granted. (North Georgia Finishing, Inc. v. DiChen, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 [1975].)

B.

A seemingly constitutionally valid rule or law will be struck down if it has been unconstitutionally applied.

The Supreme Court of the United States has clearly indicated that even where a statute or code appears to be constitutional, the Court will strike it down if it finds that it is being unconstitutionally applied to suppress

protected freedoms. Thus, it is not necessary that a state statute or code under which the proceedings were instituted be unconstitutional on its face. This Court held, inter alia:

> "We have not hesitated on direct review to strike down applications of constitutional statutes which we have found to be unconstitutionally applied to suppress protected freedoms." See Cox v. Louisiana 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965); Wright v. Georgia, 373 U.S. 284, 83 S. Ct. 1240, 10 L. Ed. 2d 349; Edwards v. South Carolina, 372 U.S. 229, 82 S. Ct. 680, L. Ed. 2d 997 (1963); Cameron v. Johnson, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968), id. 390 U.S. at 620, 88 S. Ct. at 1340].

It is not necessary that the vehicle be a criminal prosecution by the state -- disbarment proceedings having been described as "proceedings of a quasi-criminal nature", qualify. In Re Ruffalo, supra, where, under color of state law,

the Court ruled, "the effect is to chill the exercise of protected freedoms". (See Eisenberg v. Boardman, 302 F. Supp. 1360, 1364 (W.D. Wis. [1969].)

In Taylor v. Kentucky State Bar Assoc., 424 F. 2d 478, 482, (6th Cir. 1976), the Court of Appeals noted that where, as in the case at bar, "ordinary officials of bar associations, not justices, set grievance proceedings in motion, the reluctance of federal tribunals to interfere with a state proceeding would nevertheless have to bend in the light of such procedural assaults upon the right of a lawyer."

We must also bear in mind that the antagonist, namely the "prosecutor" of Gunter, is the one who determined that he should be deprived of his ordinary rights to a hearing before the District Committee

and that the matter should be sent directly to a public hearing before a three judge panel.

Particularly noteworthy is the fact that a member of the Disciplinary Board, Billy J. Tisinger, was the complainant and could very well have unduly influenced the Committee to subvert Gunter's right to a hearing before a District Committee, which would have been confidential and private, and send it directly to a public hearing before a three judge panel.

It must be recognized that Tisinger as a member of the Disciplinary Board was in a position to influence the District Committee to abridge the ordinary rights of petitioner, and yet no information was given to petitioner or his counsel to determine whether his rights had been abridged or whether undue influence or

other impropriety had taken place before the Committee, the Board, or elsewhere.

We do not believe that this court will countenance such improper procedures where the judge is also in essence the prosecutor.

In Mesaroch v. United States, 352 U.S. 1, 9, this court explained:

> " ... the untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts ... The government of a strong and free nation does not need [suspensions] based on such [procedures]."

In Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886), the Supreme Court of the United States made it quite clear that it is a denial of equal protection of the law to apply an ordinance or code or statute in a discriminatory manner, even if the

particular code, ordinance, or statute seems to be constitutional on its face. To paraphrase Yick Wo, supra, we submit that this court is not being asked to pass upon the validity of the code or rule complained of, but merely of the unequal and unjust discrimination of its administration. As was noted in Yick Wo, the facts herein establish an administration directed so exclusively against a particular individual as to warrant and require the conclusion, that, whatever may have been the intent of the ordinance or rule as adopted, it is applied with a mind so evil and oppressive as to amount to a practical denial of equal protection of the laws.

Thus, in Yick Wo, the Court explained:

> " ... though the law itself be fair on its face and impartial in appear-

> ance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution ..."

Discrimination comes in many forms. In the case at bar, a prosecutor and complainant, Mr. Tisinger, sat on the Disciplinary Board in the system that determined to deprive petitioner of his rights to a hearing before a Disciplinary Committee by sending the case directly to a three judge panel.

Discrimination is ipso facto evil and may not necessarily involve minorities. (See Regents of Univ. of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 [1978]). De Jure and de facto discrimination is

equally to be avoided and struck down. (See also Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 [1954]).

In the court below, the Virginia Supreme Court specifically ruled at page 4 of its Opinion that a disciplinary action that could result in suspension or disbarment of an attorney was strictly civil, stating "a proceeding to discipline an attorney ... is a special proceeding, civil and disciplinary in nature and of summary character." (Emphasis added.)

It is obvious that the court was totally unmindful of or ignored In Re Ruffalo, supra, which clearly declares such a proceeding is quasi-criminal in nature.

The Supreme Court of Virginia on page 5 of its Opinion virtually concedes

that the discrimination occurred with respect to petitioner herein, recognizing that "the vast majority of disciplinary cases are handled under Paragraph 13". It rejected petitioner's argument that the Constitution required that "members of [a] class who are similarly situated ... be treated equally".

The court makes little of the argument and declares that the Seventh District Committee exercised its option to proceed before the Circuit Court and, therefore, there was no denial of equal protection or due process.[4]

The Supreme Court of Virginia at page 5 of its Opinion makes that casuistic

[4] Petitioner's counsel has been informed that there is no case that could be found where a similar procedural bypass has ever occurred in anything approaching similar circumstances.

argument that since a member of the Disciplinary Board was a complainant, Gunter was not entitled to the same procedural rights as other attorneys. It did not consider the fact that Mr. Tisinger, the complainant who was a member of the Disciplinary Board, should have recused himself, or that some other procedure could have been afforded to avoid the procedural deprivation that occurred herein.

Accordingly, irrespective of the constitutionality of the code and rules that appear to be facially proper, the manner in which those rules or codes were administered herein or applied herein are clearly unconstitutional and violative of the federal constitution.

Thus, the order suspending petitioner from the practice of law should

be vacated and the matter be remanded to the Seventh District Committee for procedures consistent with the ordinary course that should have been followed in the first place.

POINT II

> The application of the codes and rules of Virginia as applied in the case at bar are violative of petitioner's rights under the Fourteenth Amendment to the United States Constitution to equal protection and due process of law. The denial of a hearing as to why the Seventh District Committee, after two years, inexplicably and apparently arbitrarily, determined to deny petitioner a hearing before it is patently unconstitutional as applied and is exacerbated by the fact that a member of the Disciplinary Board, Mr. Tisinger, was the complainant herein and could well have adversely or unduly influenced the Committee to deprive Gunter of his rights to a hearing. The failure of the Circuit Court to grant a

> hearing for discovery as to what occurred in the Committee or elsewhere to warrant its strange behavior further raises the specter that unacceptable or improper procedures or behavior occurred in the Committee. This Court should, therefore, grant the relief requested.

Considerable time has been spent in the preceding point establishing the fact that even a code, ordinance, statute or rule that appears to be constitutional on its face may well be unconstitutional as applied. In the case at bar, it has been demonstrated that an impermissible and unconstitutional application of the rules was applied to Gunter, thus depriving him of his Fourteenth Amendment rights to due process of law and the equal protection of the laws.

In the recent case of Frazier v. Heebe, 482 U.S. 641 ( ), this court citing In Re Ruffalo, supra, noted that

the Supreme Court of the United States may exercise its inherent supervisory power to ensure that local rules are consistent with "the principles of right and justice." While supervisory power in Frazier v. Heebe, supra was exercised over a lower federal court, this court has the power to overturn the unconstitutional application of rules and codes to deprive a lawyer of his right to practice without affording him a constitutionally proper hearing.

In Johnson v. Avery, 393 U.S. 483, 490 n.11, 89 S. Ct. 747, 751 n.11 (1969), this court held:

> "The power of the states to control the practice of law cannot be exercised so as to abrogate federally protected rights."

See also Ex Parte Secombe, 60 U.S. (19 How) 9, 13 (1856); In Re Fisher, 179 F.

2d 361, 3690 (7th Cir. 1950), cert. denied sub nom.; Kerner v. Fisher, 340 U.S. 825, 71 S. Ct. 59 (1950).

The courts must not exercise their supervisory control in an arbitrary manner, but must show a legal discretion in the exercise thereof [Staud v. Stewart, 366 F. Supp. 1398, 1401 (e.D. Pa. 1973); In Re Markay, 416 P. 2d 823 (Alaska 1965), cert. denied 384 U.S. 1003, 86 S. Ct. 1907 (1966); and Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625 (1967)].

It is interesting to note that the Klein case was on certiorari from the State of New York, not a federal court.

See also Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S. Ct. 752 (1937) and Koningsberg v. State Bar of California, 353 U.S. 252, 77 S. Ct. 722,

reh. denied 354 U.S. 927, 77 S. Ct. 1374 (1957).[5]

In Erdmann v. Stevens, 448 F.2d 1205, 1209-10 (2d Cir.) Cert. denied 409 U.S. 889, 93 S. Ct. 126, 34 L. Ed. 2d 147 (1972):

> "[I]n our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than a civil proceeding ... [I]t cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss

[5] While we do not know what happened in the Seventh District Committee to motivate it to deny Gunter the usual procedures and a hearing before the Seventh District Committee, we wish to, at least, alert this court to the fact the Sixth Amendment of the United States Constitution guarantees a right of confrontation, and a hearing should have been granted as to why the Committee acted in the alarming and unconstitutional manner it apparently did (See Smith v. Illinois, 390 U.S. 129; and Alford v. United States, 282 U.S. 267).

> of which may be a greater punishment than a monetary fine." See Bradley v. Fisher, 80 U.S. [13 Wall], 335, 355, 20 L.Ed. 646 (1872); Spevack v. Klein, 835 U.S. 511, 516, 87 S.Ct. 625, 17 L.Ed. 2d 574 (1967). "Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment -- loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions ..." (Emphasis supplied.)

Clearly in the case at bar, by sending the complaint directly to a public three judge court, instead of affording Gunter a private and confidential hearing before the Seventh District Committee as every other lawyer would have been entitled, it virtually ruined his reputation because of the

attendant publicity that ensued.[6]

When an individual is faced with a criminal prosecution, strict adherence to the full panoply of due process protections is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. In other situations, the importance of the right as well the need of the state for summary procedures to carry out a particular public policy have been balanced in determining which procedural protections

[6] As a matter of fact, we submit that this unconstitutional procedure of stigmatizing petitioner through a public hearing before a three judge court without affording him an opportunity to explain away the charges in a confidential hearing before the Seventh District Committee may have been tantamount to a Bill of Pains and Penalties in violation of the Bill of Attainder section of the United States Constitution in violation of Article I, Section 10. (Cummings v. Missouri, (1867 U.S.) 4 Wall 277, 18 L. Ed. 356.)

must apply. (See, e.g., Goss v. Lopez, 419 U. S. 565, 92 S. Ct. 729, 482 L. Ed. 2d 725 [1975] - suspension of students; Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, [1972] - suspension of driver's license); Goldberg v. Kelley, 397 U.S. 254, 90 S. Ct. 1011, [1970] - termination of relief payments; Willner v. Committee on Character and Fitness, 373 U.S. 96, 102, 83 S. Ct. 1175, 1179-80 [1963] - exclusion from the Bar, and so forth.)

Because due process calls for such procedural protection as the particular situation demands,

> "Consideration of what procedures due process may require under any set circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental actions." (Cafeteria and

> Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1343, reh. denied 368 U.S. 869 [1961]).

Most important, however, we emphasize that this court has held:

> "The fundamental requisite of due process is the opportunity to be heard" (Granniz v. Ordean, 243 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L. Ed. 1363 [1914])

Particularly true, as in the case at bar, is the good name, integrity, reputation, and honor which is at stake because of government action. A full and fair hearing should include, at the very least, notice of the charges or complaint, disclosure of evidence supporting the charges and an opportunity to be heard and confront or cross-examine witnesses. This opportunity to be heard should include a hearing where it is alleged that an unconstitutional

procedure occurred such as was alleged in the case at bar concerning the inexplicable and frightening action of the Seventh District Committee, which deprived petitioner of his rights to a hearing in confidence before the Committee. (See Board of Regents v. Roth, 408 U.S. 564, 573, 92 S. Ct. 2701, 2707 [1972]; Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 5109 [1971]; and Willner v. Commission on Character and Fitness, supra, 373 U.S. 96, 103). Furthermore, this Court has held that the hearing "must be granted ... in a meaningful manner" (Armstrong v. Monzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 [1965]). In the case at bar, the three judge court refused to allow oral argument on urgent and important motions alleging possible dishonesty or at least

impropriety in the actions of the Committee. This was a gross violation of its discretion and impacted upon petitioner's due process and equal protection rights. In Herring v. New York, 422 U.S. 853, 95 S. Ct. 2550 [1975], this Court emphasized the need for oral argument and its importance in satisfying due process requirements.

We have already addressed the complaint made concerning the fact that the three judge court had refused oral hearings on the motions made by petitioner with respect to the Committee's inexplicable and arbitrary actions in denying a hearing before it and with respect to the motions addressed thereto.

POINT III

The Sixth Amendment is also implicated since a denial of oral argument and a hearing diminishes the effectiveness of counsel.

The foregoing procedure was not only violative of the due process and equal protection rights of Gunter, but also deprived him of the effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution because counsel could not act adequately for him if the court declined to hear him. (See Argensinger v. Hamlin, 407 U.S. 25, 82 S. Ct. 2006 [1972]; Klopfer v. North Carolina, 386 U.S. 213, 87 S. Ct. 988 [1967]; and Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550.)

Occasionally in appellate proceedings, oral argument may be

curtailed to some extent (FCC v. WJR, the Goodwill Station, 337 U.S. 265, 276, 69 S. Ct. 1097, 1103-1104 [1949]), while still at the so called trial level and determination of credibility is essential with respect to witnesses and others, it is error to deny oral hearings (Londoner v. Denver, 210 U.S. 373, 386, 28 S. Ct. 708 [1908]).

Even on the appellate level, a survey conducted by the Commission on the Revision of the Federal Court Appellate System Structure and Internal Procedures: Recommendations for Change 66 (1975), an impressive 90% of attorneys questioned in an extensive survey of attorney attitudes in three circuits agreed that:

> "Judges are better able to avoid erroneous interpretations of the facts or issues in the case if they can direct questions to counsel, and that oral

> argument permits the attorney to address himself to those issues which the judges believe are crucial to the case." (Id. at 67.)

In Chambers v. State of Florida, 309 U.S. 227, 241, 60 S. Ct. 472, 479, ( ), the court held that "all people charged with misconduct must, so far as the law is concerned, stand on an equality before the bar of justice in every American court". The State of Virginia seems to think that, because a hearing before a three judge court was afforded, that it was irrelevant that the hearing desired and due to Gunter before the Seventh District Committee was denied. In Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 80, 50 S. Ct. 228, 230 [1930], this Court explained:

> "As to the due process clause of the Fourteenth Amendment,

> it is sufficient to say that as frequently determined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." (Emphasis added.) (See also Lindsey v. Normet, 405 U.S. 56, 57, 92 S. Ct. 862, 876 [1972]).

See also Ward v. Village of Monroeville, 409 U.S. 57, 61, supra. In Re Muchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625 [1955], this court stated that "a fair trial and a fair tribunal is a basic requirement of due process".

Under the circumstances we submit that petitioner was deprived not only of his rights to due process and equal protection under the Fourteenth Amendment but also his right to effective assistance of counsel by being deprived of essential hearings.

CONCLUSION

Petitioner was deprived of due process of law and the equal protection of the laws in violation of the Fifth and Fourteenth Amendments of the United States Constitution in that the rules and codes as applied were in violation of the Fourteenth Amendment. Furthermore, the denial of hearings deprived the petitioner of effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

The petition should be granted.

Dated: April 10, 1991
New York, New York

Respectfully submitted,

Irving Anolik By M.C.H.

IRVING ANOLIK
A Member of the Bar at this Court
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

ATTORNEY'S CERTIFICATION

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

IRVING ANOLIK, a member of the Bar of this Court certifies that three true copies of the within Petition for a Writ of Certiorari was duly served on the 10th day of April, 1991, upon the Attorney General of the Commonwealth of Virginia, attention: Peter R. Messitt, Esq., Assistant Attorney General, Supreme Court Building, 101 North 8th Street, Richmond, Virginia 23219, Attorney for Respondent by hand delivery.

Dated: April 10 , 1991

Irving Anolik by MKH
IRVING ANOLIK

RECORD NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ELTON EUGENE GUNTER,

Petitioner

against

VIRGINIA STATE BAR, ex rel, THE SEVENTH DISTRICT COMMITTEE and BILLY J. TISINGER, ESQUIRE,

Respondent

APPENDIX

IRVING ANOLIK,
a member of the Bar of this Court
Attorney for the Petitioner
225 Broadway, Suite 1915
New York, New York 10007-3082
(212) 732-3050

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Present: Carrico C. J., Compton, Stephenson, Russell, Lacy, Hassell, JJ., and Poff, Senior Justice

ELTON EUGENE GUNTER

v. Record No. 901020

VIRGINIA STATE BAR, EX REL.,
THE SEVENTH DISTRICT COMMITTEE,
AND BILLY J. TISINGER, ESQUIRE

OPINION BY SENIOR JUSTICE RICHARD H. POFF
January 11, 1991

FROM THE CIRCUIT COURT OF THE CITY OF WINCHESTER
Thomas D. Horne, Paul D. Brown, and James W. Haley, Jr., Judges

In this appeal of right from a judgment entered in a disciplinary proceeding conducted pursuant to Code Section 54.1-3935, we consider an attorney's contentions that he has been denied due process and equal protection of the laws. Finding no merit in the arguments he makes in support of those contentions, we will affirm the judgment.

The Virginia State Bar initiated

disciplinary proceedings against attorney Elton Eugene Gunter based upon a complaint alleging, inter alia, that Mr. Gunter

> committed a deliberately wrongful act; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation that adversely reflected on his fitness to practice law; concealed and knowingly failed to reveal facts which he was required by law to reveal; . . . knowingly made a false statement of fact; and participated in the creation or preservation of evidence when he knew or it was obvious that such evidence was false . . . .

The complaint was referred for investigation to the Seventh District Committee of the Bar (the Committee). Because the complaint had been filed by one of the members of the Virginia State Bar Disciplinary Board (the Board), Billy J. Tisinger, the Committee changed its original decision to convey the complaint

to that board. Invoking the authority contained in Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia (Paragraph 13), the Committee filed a complaint under Code Section 54.1-3935 in the Circuit Court of the City of Winchester on January 31, 1990.

At the conclusion of a hearing conducted as provided in the statute by a three-judge panel, the court found, by "clear and convincing" evidence, that

> Mr. Gunter knowingly, wrongfully, deliberately, and intentionally misrepresented material facts to [two liability insurance companies] in that he represented his personal injuries and symptoms were related to the particular automobile accident that each of the two companies was adjusting, by submitting no less than 12 bills to each company for the same charges . . . .

Based upon its findings, the court ruled that "Mr. Gunter violated the provisions of Disciplinary Rule 1-102(A)(3) and (4), as alleged in the Complaint". As appears from the final order entered April 30, 1990, Mr. Gunter "presented mitigating evidence and the Bar presented evidence of [Gunter's] prior disciplinary record",[1] and the court suspended his license to practice law "for a period of one (1) year, effective June 1, 1990."

On appeal, Mr. Gunter argues that "the proceedings before the District Committee were in violation of the Rules of the Supreme Court of Virginia and denied [him] due process of law and equal

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[1] See Gunter v. Virginia State Bar, 238 Va. 617, 385 S.E.2d 597 (1989); Seventh District Committee v. Gunter, 212 Va. 278, 183 S.E.2d 713 (1971).

protection of the law." In his view, the Committee abridged his constitutional rights when it referred the complaint to the judiciary without affording him a hearing. Specifically, he says that "Paragraph 13B of the Rules contained certain procedural safeguards available to attorneys in proceedings before a District Committee". He points out that, subject to an exception irrelevant here, Paragraph 13 provides for a hearing conducted by a committee before it conveys a complaint to the Board and to a second hearing by the Board; that a rule promulgated pursuant to Paragraph 13 (Rule IV D of the Virginia State Bar Council Rules of Disciplinary Procedure for District Committees) provides that an attorney who alleges noncompliance with Paragraph 13 is entitled to present

evidence and argument in support of that allegation; and that Paragraph 13 makes proceedings before the Committee and the Board confidential.

Mr. Gunter's procedural due process argument ignores the fact that the "procedural safeguards" listed in Paragraph 13 are expressly qualified and conditional. Subparagraph (B)(5)(a) of that Paragraph provides: "Nothing herein shall be construed to prevent Bar Counsel or a District Committee from proceeding before a circuit court as provided in [Section 54.1-3935) of the Code of Virginia." Read together, the statute and Paragraph 13 vest Bar Counsel and a District Committee with the option of conducting disciplinary proceedings either administratively or before a three-judge court. We see no due process

defect in such an option, and we reject Mr. Gunter's argument that the Committee abridged his rights by filing the complaint in the circuit court.

Mr. Gunter, turning to the judicial proceedings, contends that the circuit court infringed his procedural due process rights by denying him an evidentiary hearing when he moved the court to remand the complaint to the Committee for the conduct of "proceedings in accordance with Paragraph 13". We do not agree.

Although an attorney, like a district committee, is given a right to remove disciplinary proceedings from the administrative forum to a circuit court, Paragraph 13(C)(5)(a)(ii)[2], no attorney

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[2] See, e.g., Gunter v. Virginia State Bar, 238 Va. at 619, 385 S.E.2d at 598.

has a right to insist that the proceedings be confined to the administrative forum. Because Mr. Gunter's claim to such a right was without merit as a matter of law, an evidentiary hearing on his motion to remand was unnecessary, and we uphold the court's ruling.

In aid of his motion to discovery during the court proceedings, Mr. Gunter proffered interrogatories seeking statistics and other data related to his several constitutional challenges. The court denied the motion and, assigning error to that decision, Mr. Gunter argues that the ruling was another violation of his procedural due process rights. If "[t]here is no general constitutional right to discovery in a criminal case", Weatherford v. Bursey, 429 U.S. 545, 559

(1977), there is none in a civil case. "A proceeding to discipline an attorney . . . is a special proceeding, civil and disciplinary in nature, and of a summary character . . . . Being an informal proceeding it is only necessary that the attorney be informed of the nature of the charge preferred against him and be given an opportunity to answer." Seventh District Committee v. Gunter, 212 Va. at 284, 183 S.E.2d at 717. Rejecting Mr. Gunter's assignment of error, we hold that an attorney has no procedural due process right to discovery in a disciplinary proceeding conducted pursuant to Code Section 54.1-3935.

Finally, we consider Mr. Gunter's attack upon the facial constitutionality of the binary disciplinary system created by the statute and Paragraph 13. Mr.

Gunter argues on brief that "the procedures governing disciplinary proceedings were constitutionally defective" because there are no "standards to regulate when a disciplinary case would proceed under Paragraph 13 and when it would proceed pursuant to Code Section 54.1-3935." Apparently mixing the principles of due process and equal protection in his analysis, Mr. Gunter reasons that "the vast majority of disciplinary cases are handled under paragraph 13"; that the Constitution requires that "members of [a] class who are similarly situated . . . be treated equally"; and that the absence of standards enabled the Committee in this case to treat him differently for an arbitrary reason.

It may be, as Mr. Gunter suggests,

that district committees usually choose the administrative forum for the conduct of disciplinary proceedings. That does not mean, however, that the Seventh District Committee, by exercising its option to proceed before the circuit court in this case, denied Mr. Gunter due process or equal protection of the laws. In the first place, we find no merit in the suggestion that a proceeding in a court of law is somehow constitutionally inferior to an administrative proceeding. Moreover, the action of the committee was not arbitrary. The uncontradicted evidence shows that the only reason the Committee decided not to refer Mr. Gunter's case to the Board was that the author of the complaint against him was a member of that board. For that reason, Mr. Gunter was not similarly situated

with other members of his class and, applying the constitutional standards summarized in Etheridge v. Medical Center Hospitals, 237 Va. 87, 97, 376 S.E.2d 525, 530 (1989), we reject Mr. Gunter's challenge to the facial constitutionality of the disciplinary system.[3]

Finding no merit in Mr. Gunter's assignments of error, we will affirm the judgment below.

Affirmed.

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[3] To succeed in a challenge to the facial constitutionality of a legislative act, "the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). It is not sufficient to show that the act "might operate unconstitutionally under some conceivable set of circumstances". Id. Mr. Gunter has "failed to shoulder [this] heavy burden". Id.

VIRGINIA:

BEFORE THE CIRCUIT COURT FOR THE
CITY OF WINCHESTER

THE VIRGINIA STATE BAR EX REL
THE SEVENTH DISTRICT COMMITTEE
and
BILLY J. TISINGER,
Complainants

v. Case No. 90-L-11

ELTON E. GUNTER,
Respondent

ORDER

On March 29, 1990, a hearing in this matter was held before a duly convened Three-Judge Circuit Court panel consisting of the Honorable Paul D. Brown, the Honorable James W. Haley, Jr., and the Honorable Thomas D. Horne, presiding.

Elton E. Gunter, appeared in person

and with his counsel, Holmes C. Harrison. Rhetta M. Daniel, Senior Assistant Bar Counsel, appeared as counsel for the Virginia State Bar.

The Bar and the Respondent presented testimony, documentary evidence and argument of counsel. The Respondent presented mitigating evidence and the Bar presented evidence of the Respondent's prior disciplinary record.

WHEREBY the opinion of the Court is as follows:

This cause came to be heard upon the complaint of the Virginia State Bar, in that Elton E. Gunter committed a deliberately wrongful act, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation that adversely reflected on his fitness to practice law; concealed and knowingly

failed to reveal facts which he was required by law to reveal; knowingly used perjured testimony and false evidence; knowingly made a false statement of fact; and participated in the creation or preservation of evidence when he knew or when it was obvious that such evidence was false.

UPON CONSIDERATION WHEREOF, the Court finds that the Virginia State Bar has shown by the evidence, which the Court deems clear and convincing, the following:

1. Between January 1982 and October 1985, Mr. Gunter knowingly, wrongfully, deliberately, and intentionally misrepresented material facts to the Virginia Mutual Insurance Company and to the State Farm Insurance Company, in that he represented his

personal injuries and symptoms were related to the particular automobile accident that each of the two companies was adjusting, by submitting no less than 12 bills to each company for the same charges; and

2. That on or about August 25, 1982 to September 30, 1982, Mr. Gunter knowingly, wrongfully, deliberately and intentionally wrote four letters, Virginia State Bar Exhibits R, S, T and U, to Agent Hugh K. Malbon, Jr., an adjuster for the Virginia Mutual Insurance Company, Earl D. Dodge, an adjuster with the State Farm Insurance company and to Dr. Phillip G. Banning, which letters combined to create a fraud in that the effect of these letters was to mislead the representatives of the insurance companies as to the cause of

his injuries and with the intent to defraud each of said companies.

The Court further finds that the Virginia State Bar has not shown by the evidence that Mr. Gunter committed perjury as alleged in paragraph 12 of the Complaint or that Mr. Gunter is guilty of the ethical violation found in Count Two of the Complaint.

Accordingly, the Court finds that Mr. Gunter violated the provisions of Disciplinary Rule 1-102(A)(3) and (4), as alleged in the Complaint; and after due consideration of all the evidence, the Court concluded that the seriousness of the misconduct reflects adversely upon the Respondent's fitness to practice law; and it is therefore,

ADJUDGED, ORDERED, and **DECREED,** that the circumstances of this case

justify a one year suspension of the Respondent's license to practice law in the Commonwealth of Virginia, and the license of Elton E. Gunter to practice law in the Commonwealth of Virginia be, and the same is, hereby, **SUSPENDED, for a period of one (1) year, effective June 1, 1990.**

It is further **ORDERED** that Elton E. Gunter, By June 1, 1990, give notice, by certified mail, return receipt requested, of the one (1) year suspension of his license to practice law in the Commonwealth of Virginia to all clients, if any, for whom he is currently handling matters, to all opposing attorneys and to all the presiding judges in pending litigation and that he shall further make on or before June 1, 1990, the appropriate

arrangements for the disposition of those matters presently in his care in conformity with the wishes of his clients, all pursuant to the Rules of Virginia Supreme Court, Part Six, Sec. IV, Paragraph 13(J)(1).

It is further **ORDERED** that Elton E. Gunter shall furnish written evidence of his compliance hereto to the Virginia State Bar on or before June 30, 1990.

It is further **ORDERED** that an attested copy of this Order shall be mailed by first class mail, postage pre-paid, to Elton E. Gunter, at The Kent Building, P. O. Box 1750, Winchester, Virginia 22601; to Holmes C. Harrison, counsel of record for the Respondent, at The Monument House, 606 South Main Street, Harrisonburg, Virginia 22801, and to Harry M. Hirsch, Senior Assistant

Bar Counsel, at the Virginia State Bar, Suite 1000, 801 East Main Street, Richmond, VA 23219.

Enter this Order this 30th day of April, 1990

CIRCUIT COURT FOR THE CITY OF WINCHESTER

/s/ Thomas D. Horne
Thomas D. Horne
Presiding Judge

/s/ Paul D. Brown
Judge

/s/ James W. Haley, Jr.
Judge

I Ask For This:

/s/ Harry M. Hirsch, p.q.
Harry M. Hirsch, Esquire
Senior Assistant Bar Counsel
Virginia State Bar
Suite 1000, Ross Building
801 East Main Street
Richmond, VA 23219

Seen and Objected To:

/s/ Holmes C. Harrison, p.d.
Holmes C. Harrison, Esquire
The Monument House
606 South Main Street
Harrisonburg, Virginia 22801

A copy test:

/s/ Terry Whittle
Clerk-Deputy Clerk
Winchester Circuit Court

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 11th day of February, 1991.

Elton Eugene Gunter, Appellant,

against Record No. 901020
Circuit Court No. 90-L-11

Virginia State Bar, ex rel. the Seventh District Committee, and Billy J. Tisinger, Esquire, Appellees.

ORDER DEFERRING ISSUANCE OF MANDATE

Upon consideration of the motion of the appellant, by counsel, it is ordered that the issuance of the mandate entered herein January 11, 1991 be and the same hereby is deferred, to and including the 11th day of April, 1991, on the expiration of which time the same may be issued, unless the case has been before that time

docketed in the Supreme Court of the United States, in which event issuance thereof shall be deferred until the final determination of the case by that Court.

A Copy,

Teste:

/s/ David B. Beach

Clerk

Virginia State Bar

Tenth Floor, Ross Building,

801 East Main Street

Richmond, Virginia 23219 (804)786-2061

May 5, 1987

PERSONAL AND CONFIDENTIAL

Elton E. Gunter, Esq.

The Kent Building

P.O. Box 1750

Winchester, VA 22601

Re: Tisinger v. Gunter

VSB Docket #87-070-0738

Dear Mr. Gunter:

The above-referenced complaint has been referred to the Seventh District Committee for a more detailed investigation.

I have been appointed by the committee to perform the investigation.

As the matter progresses, I will be in contact with you.

Sincerely,

/s/ Rhetta M. Daniel

Rhetta M. Daniel

Assistant Bar Counsel

/pjr

cc: Bruce T. Clark, Chairman
Seventh District Committee

Virginia State Bar

Tenth Floor, Ross Building,

801 East Main Street

Richmond, Virginia 23219 (804) 786-2061

June 12, 19898

PERSONAL AND CONFIDENTIAL

CERTIFIED MAIL - RETURN RECEIPT REQUESTED No. P-618 302 344

Elton Eugene Gunter, Esquire

The Kent Building

P. O. Box 1760

Winchester, Virginia 22601

Re: Tisinger v. Gunter

VSB Docket No. 87-070-0738

Dear Mr. Gunter:

The above-referenced matter has been referred to a Three Judge Circuit Court because the Complainant is a member of the Virginia State Bar Disciplinary Board and the Board cannot hear this matter.

Sincerely,

/s/ Rhetta M. Daniel

Assistant Bar Counsel

RMD/ew

cc: Billy J. Tisinger, Esquire

Phillip C. Stone, Chairman, VSB Disciplinary Board

Roger L. Morton, Chairman, Seventh District Committee

VIRGINIA STATE BAR

Tenth Floor, Ross Building

801 East Main Street

Richmond, Virginia 23219

(804)-786-2061

June 13, 1989

PERSONAL AND CONFIDENTIAL

Elton Eugene Gunter, Esquire

The Kent Building

P. O. Box 1760

Winchester, Virginia 22601

Re: Tisinger v. Gunter

VSB Docket No. 87-070-0738

Dear Mr. Gunter:

In response to your inquiry of why the above-referenced matter had been referred to a Three Judge Circuit Court and you had not been afforded an opportunity to be heard at the District Committee level, Paragraph 13(C) (5) (b)

(1) of the Supreme Court Rules allows a District Committee to send a case directly to the Board. When the Committee determined that the Board could not hear the matter, they decided to proceed under Section 54.1-3935 of the Code of Virginia.

Sincerely,

Rhetta M. Daniel

Assistant Bar Counsel

RMD/ew

cc: Phillip C. Stone, Chairman, VSB Disciplinary Board

Roger L. Morton, Chairman, Seventh District Committee

Law Office

E. EUGENE GUNTER

The Kent Building

P. O. Box 1750

Winchester, Virginia

22601-8250

June 14, 1989

The Honorable Rhetta M. Daniel

Assistant Bar Counsel

Virginia State Bar

Ross Building, Tenth Floor

801 East Main Street

Richmond, Virginia 23219

RE: VIRGINIA STATE BAR, ex rel BILLY J. TISINGER v. ELTON EUGENE GUNTER

VSB DOCKET NO. 87-070-0783

MY FILE NO. 3771-C

Dear Ms. Daniel:

I am in receipt of your letter to me of June 12, 1989, sent by Certified Mail with Return Receipt Requested in which you

advised that the above-captioned matter has been referred to "a Three Judge Circuit Court because the Complainant is a member of the Virginia State Bar Disciplinary Board and the Board cannot hear this matter".

I have never been granted a hearing or an opportunity to be heard by the Seventh District Committee. Am I not entitled to that opportunity under the Rules promulgated and the laws made and provided? I am of the opinion that I am so entitled and I request your response in this regard.

Thank you for your consideration of this matter.

Sincerely,

E. Eugene Gunter

EEG/yh

cc: Billy J. Tisinger, Esquire
Phillip C. Stone, Esquire

Roger L. Morton, Esquire

Holmes C. Harrison, III, Esquire

Law Offices

HARRISON, THUMMA & STARK

A Professional Corporation

The Monument House

606 South Main Street

Harrisonburg, Virginia 22801

July 5, 1989

Rhetta M. Daniel Esq.

Virginia State Bar

Tenth Floor, Ross Building

801 East Main Street

Richmond, Virginia 23219

re: Tysinger v. Gunter

VSB No. 87-070-0738

Dear Ms. Daniel:

Reference is made to your letters of June 12, 1989, and June 13, 1989, to Mr. Gunter, whom I represent.

I wish to note our objection to the procedure which has been followed in this

matter. This objection is not to be construed as being all-inclusive, because we do not know what exactly has occurred prior to the reference to a three-judge panel, and, of course, we can hardly object to that about which we do not know.

You have stated in your letter of June 13 that paragraph 13 (C) (5) (b) (1) allows a District Committee to send a case directly to the Board. However, that provision deals with a certification when there is reasonable cause to believe, among other things, that there is an imminent danger to the public, with the factual basis for that belief set forth under oath in a petition to the Board, which presumably then reviews the petition and determines how to proceed.

If there has been no finding of reasonable cause to believe that there is

imminent danger to the public, as provided by the Rules, we object to the failure of the Committee to proceed in accordance with paragraph 13 (C) (5) (a) of the Rules.

If there has been such a finding, we object to the sufficiency of the "reasonable cause". In this connection, I note that the complaint was filed in January of 1987. There is nothing about this matter which has changed materially since this case was filed 2 1/2 years ago, and there is no justification whatsoever for the employment of extraordinary procedures in this case where for that period of time such procedures were not considered necessary.

If there has been a finding that there is reasonable cause to believe that there is imminent danger to the public, we

also object to the lack of opportunity to be heard prior to that finding. Again, after the passage of 2 1/2 years it can hardly be said that emergency measures are necessary in this matter. In this and in all other objections noted herein, I note specifically Rule IV D. of the Council Rules of Disciplinary Procedure, which states that the Respondent is entitled to present evidence and argument to the Committee that noncompliance with the Committee rules has so prejudiced his rights as to deny him a constitutional right to due process.

You have stated in your letter of June 13 that "the Committee determined that the Board could not hear the matter." This indicates that the Committee determined that the case should go to the Board without having first conducted a

hearing on the merits of the complaint and without an opportunity for Mr. Gunter to be heard, to which we object.

Further, we take the position that it is for the Board to determine whether it can hear a matter, not for the Bar or the committee to determine whether the Board can or will hear a case. We take the position that Mr. Gunter is entitled to have the Committee follow its rules as in any other case, and it is not for the Committee to change those rules or its normal practices in anticipation of what the Board may or may not do with regard to hearing the matter. Therefore, we object to the Committee having made a determination that the Board would not hear the case, particularly if that determination was made with input from the Bar (to which Mr. Gunter obviously was not

a party), and we object to the Committee having proceeded as it has following that determination.

The procedures which are being employed in this case do not comply with the procedures set forth in the Rules of the Supreme Court or those of the Bar Council, and I am unable to find specific procedures which authorize the Bar and the Committee to proceed as they have. To the extent that the Bar and/or the Committee is employing a procedure which is not subject to specific written guidelines, the procedure being employed is constitutionally defective because it is subject to arbitrary interpretation by those who are empowered to bring disciplinary proceedings.

Moreover, if the procedures which are sought to be followed in this case are

allowed, then in any case in which a member of the Disciplinary Board makes a complaint, the member of the bar against whom that complaint is made automatically, for all practical purposes, loses the right established by the Rules to have a committee hearing and a hearing before the Board. That, I submit, is not contemplated by, nor authorized by, the statutes and the Rules.

Because of the procedures which have been followed herein, Mr. Gunter will be brought to trial before a three-judge panel without having had an opportunity to be heard or to confront his accusers. There is no justification for such action in the form of imminent danger to the public or other such reason. Mr. Gunter has been totally denied due process of law in this regard, and he objects to the

procedures which have been followed in this matter.

I request that this letter be forwarded to whoever now has the case before them for whatever determination is now being made and that we be advised as further actions are taken, in order that we may continue to object to the extraordinary fashion in which this case is proceeding.

Sincerely,

Holmes C. harrison

HCH/tgh

cc: Philip C. Stone, Esq.

Roger L. Morton, Esq.

VIRGINIA STATE BAR

Tenth Floor, Ross Building

801 East Main Street

Richmond, Virginia 23219

(804)-786-2061

July 17, 1989

PERSONAL AND CONFIDENTIAL

Holmes C. Harrison, Esquire

Harrison, Thumma & Stark

The Monument House

606 South Main Street

Harrisonburg, Virginia 22801

Re: Tisinger v. Gunter

VSB Docket No. 87-070-0738

Dear Mr. Harrison:

This is to acknowledge receipt of and to thank you for your correspondence dated July 5, 1989 which was received by the Virginia State Bar on July 10, 1989.

You may file a Motion for

Reconsideration with the Seventh District Committee. In asking the Bar to take the case to the Circuit Court, the Seventh District Committee proceeded pursuant to Section 54.1-3935. The Committee did not proceed under any of the provisions of the Rules of Virginia Supreme Court, Part Six, Section IV, Paragraph 13.

If you have any questions, please contact me at (804) 786-5954.

Sincerely,

Rhetta M. Daniel

Senior Assistant Bar Counsel

RMD/ew

cc: Roger L. Morton, Chairman, Seventh District Committee

Phillip C. Stone, Chairman, VSB Disciplinary Board

Law Offices

HARRISON, THUMMA & STARK

A Professional Corporation

The Monument House

606 South Main Street

Harrisonburg, Virginia 22801

August 23, 1989

Roger L. Morton, Esquire

139 West Davis Street

Culpeper, Virginia 22701

re: Tisinger v. Gunter

VSB Docket 87-070-0738

Dear Mr. Morton:

Reference is made to my letter of July 5, 1989 to Rhetta M. Daniel and her letter to me of July 17, 1989, copies of which are attached.

I request that you consider my letter a Motion for Reconsideration, for the reasons set forth therein.

If you desire that I file such motion in a different format, please let me know, and I shall do so.

Sincerely,

Holmes C. Harrison

HCH/dfm

cc: Rhetta M. Daniel, Esquire

COMMONWEALTH OF VIRGINIA

VIRGINIA STATE BAR

SEVENTH DISTRICT COMMITTEE

PERSONAL AND CONFIDENTIAL

September 19, 1989

Please Reply To:

Roger L. Morton, Esquire

Button, Yeaman & Morton

139 W. Davis Street

Culpeper, VA 22701

Telephone: (703) 825-0766

Holmes C. Harrison, Esquire

Harrison, Thumma & Stark

606 South Main Street

Harrisonburg, Virginia 22801

Re: Tisinger v. Gunter

VSB Docket No. 87-070-0738

Dear Mr. Harrison:

The Committee, at its meeting held on September 14, 1989, considered your Motion to Reconsider, and after discussion of the same, voted to deny the Motion to Reconsider.

Sincerely,

Roger L. Morton

sfh

cc: Ms. Rhetta M. Daniel

TWENTIETH JUDICIAL CIRCUIT

OF VIRGINIA

Fauquier, Loudoun and

Rappahannock Counties

14 March 1990

Rhetta M. Daniel, Esq.

Virginia State Bar

Suite 1000

801 East Main Street

Richmond, Virginia 23219

Holmes C. Harrison, Esq.

606 South Main Street

Harrisonburg, Virginia 22801

In re: Virginia State Bar, Ex Rel, The Seventh District Committee v. Elton E. Gunter
Case No. 90-L-11

Dear Ms. Daniel and Mr. Harrison:

The undersigned has been designated as Chief Judge in the above styled proceeding brought pursuant to Section 54.1-3935, Code of Virginia, 1950, as amended. Since the designation of the three judge court, I have received the following motions filed on behalf of Mr. Gunter:

1. Motion to Remand to an Appropriate District Committee for further proceedings or Motion to Dismiss

2. Motion for Leave to Conduct Discovery.

Counsel for Mr. Gunter has requested that he be permitted oral argument on the motions and that the show cause hearing be continued. These motions are denied. In electing to proceed before a three judge panel, Bar Counsel and the Seventh District Committee have exercised the right to seek such relief pursuant to Paragraph 13 (b) (5) (a), Rules of supreme Court of Virginia and Section 54.1-3935, Code of Virginia, 1950, as amended. As counsel are aware, a proceeding pursuant to Section 54.1-3935, Code of Virginia, is informal in nature and it is only necessary that the attorney be informed of the nature of the charge and be given an opportunity to answer.

Part 4 of the Rules of the Supreme Court do not apply to such proceedings.

Accordingly, the three judge court designated by the Chief Justice will convene for hearing on March 29, 1990 at 10:00 AM as scheduled.

Ms. Daniel may draw an order consistent with this opinion to which Mr. Harrison may note his exception.

Very truly yours,

Thomas D. Horne

cc: Honorable James W. Haley, Jr.
Honorable Paul D. Brown

TDH/aea

Sec. 54.1-3935. **Procedure for revocation of license.** - A. If the Supreme Court, the Court of Appeals, or any circuit court of this Commonwealth observes, or if a complaint, verified by affidavit is made by any person to such court, that any attorney has been convicted of a misdemeanor involving moral turpitude or a felony or has violated the Virginia Code of Professional Responsibility, the court may issue a rule against such attorney to show cause why his license to practice law shall not be revoked. If the complaint, verified by affidavit, is made by a district committee of the Virginia State Bar, the court shall issue a rule against the attorney to show cause why his license to practice law shall not be revoked.

B. At the time the rule is issued the court issuing it shall certify the fact of such issuance and the time and place of the hearing thereon, to the Chief Justice of the Supreme Court, who shall designate three circuit court judges of circuits other than the circuit in which the case is pending to hear and decide the case.

C. Bar Counsel of the Virginia State Bar shall prosecute the case. Special counsel may be appointed to prosecute the case pursuant to Section 2.1-122.

D. Upon the hearing, if the attorney is found guilty by the court, his license to practice law in this Commonwealth shall be revoked or suspended for such time as the court may prescribe. However, in lieu of revocation or

suspension, the court may reprimand such attorney.

E. The attorney, may, as of right, appeal from the judgment of the court to the Supreme Court, by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law. In all such cases where an attorney's license to practice law has been revoked by the court, his privilege to practice law shall be suspended pending appeal.

F. In any proceeding to revoke the license of an attorney, the attorney shall be entitled to representation by counsel.

G. Nothing in this section shall affect the right of a court to require from an attorney security for his good behavior, or to fine him for contempt of court. (Code 1950, Sections 54-74, 54-75; 1956, Ex. Sess., c. 33; 1964, c. 201; 1970, c. 430; 1972, c. 103; 1980, c. 289; 1984, cc. 289, 703; 1988, c. 765.)

DR 1-102. Misconduct. -- (A) A lawyer shall not:
(1) Violate a Disciplinary Rule or knowingly aid another to do so.
(2) Circumvent a Disciplinary Rule through actions of another.
(3) Commit a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law.
(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law.
(B) A lawyer admitted to practice in this jurisdiction is subject to these Disciplinary Rules although engaged in practice elsewhere, unless Disciplinary Rules of the foreign jurisdiction permit the activity.

13. **Procedure for Disciplining, Suspending and Disbarring Attorneys.** - A. Definitions. - As used in this Rule (Paragraph), the following terms shall have the meaning herein stated unless the context clearly requires otherwise:

"Attorney" means a member of the Virginia State Bar, any other attorney admitted to regular or limited practice in this State, and any member of the bar of any other jurisdiction while engaged, pro hac vice or otherwise, in the practice of law in Virginia.

"Bar" means the Virginia State Bar.

"Bar Counsel" means an attorney who, together with such assistants as may be required, is appointed as Bar Counsel, subject to the approval of the Attorney General pursuant to Section 2.1-122(c) of the Code of Virginia (1950), as amended, by the Council of the Bar.

"Board" means the Virginia State Bar Disciplinary Board appointed as hereinafter provided.

"Charge of Misconduct" means any oral or written communication alleging Misconduct or from which allegations of Misconduct or from which allegations of Misconduct reasonably may be inferred.

"Clerk of the Disciplinary System" means that employee of the Virginia State Bar who, together with such assistants as may be required, provides administrative support to the disciplinary system and serves as official keeper of the Bar's disciplinary records.

"Council" means the Council of the

Bar.

"Crime" means:

(a) Any offense declared to be a felony by federal or state law;

(b) Any other offense, whether federal or state, involving theft, fraud, forgery, extortion, bribery, or perjury; or

(c) An attempt, solicitation or conspiracy to commit any of the foregoing.

"Disability" means:

(a) The status of being a drug addict, an alcoholic, or mentally ill as those terms are defined in Section 37.1-1 of the Code of Virginia, or

(b) Any physical or mental condition that materially impairs the fitness of an Attorney to practice law.

"District Committee" means one of the District Committees appointed as hereinafter provided.

"Executive Director" means the Executive Director of the Bar and any assistant designated by Council to act in his stead.

"Judge" means a person within the definition of judge contained in Section 2.1-37.1 of the Code of Virginia.

"Misconduct" means:

(a) Any malpractice or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct, as described in Section 54-74(6) of the Code of Virginia;

(b) Any violation of the Code of Professional Responsibility, or

(c) Conviction of a criminal offense, other than a Crime as defined herein, which reflects upon the fitness of an Attorney to practice law.

"Respondent" shall mean an Attorney

against whom a Charge of Misconduct has been made or who is the subject of any proceeding under this Paragraph 13.

"Standing Committee" means the Standing Committee on Lawyer Discipline created and appointed under Article VII, Section 4 of the Bylaws of the Virginia State Bar and Council.

B. Authority and Duties of the Council, the Standing Committee, District Committees and Bar Counsel; Investigation and Prosecution of Charges of Misconduct. - (1) Authority and Duties of the Council and the Standing Committee; The Council shall have general administrative authority over and responsibility for the disciplinary system created pursuant to this Paragraph 13; provided, however, that the Council shall have no authority over the Board, nor shall the Council have authority over a District Committee exercising its adjudicative powers under this Rule. Council shall appoint District Committees as provided herein and shall prescribe uniform rules of procedure for the District Committees. All such powers and duties of Council may be exercised by the Standing Committee, subject to direction and control of the Council, except the power to appoint District Committees and prescribe rules of procedure.

(2) Appointment of Committees; Quorum Requirements:

(a) Council shall appoint a District Committee for each congressional district of the State.

(b) Each member of a District Committee shall be a resident of or have his office in the congressional district of the District Committee for which he

is appointed.

(c) Members shall, to the extent practicable, be appointed from different sections of their districts.

(d) Each District Committee shall consist of nine, or in the discretion of Council eighteen or twenty-seven members. Two members of a nine-member District Committee and four members of an eighteen-member District Committee and six members of a twenty-seven member District Committee shall be nonlawyers. If a District Committee consists of eighteen members or more, nine members designated by the District Committee Chairman may act on any matter. A majority of the members so designated or of any other District Committee shall constitute a quorum, and the action of a majority of a quorum shall be the action of the District Committee. Participation by nonlawyer members shall not be required in any proceeding if a quorum is otherwise present.

(3) Authority and Duties of Bar Counsel: To the extent provided in this Rule and subject to the general supervision of the Standing Committee, Bar Counsel shall initiate, investigate and prosecute Charges of Misconduct and other proceedings before District Committees, the Board and the Circuit Courts.

(4) Authority and Duties of District Committees; Jurisdiction:

(a) The principal duty of a District Committee shall be to consider, adjudicate and make disposition of Charges of Misconduct filed with the District Committee pursuant to this Rule. In addition, members of a District Committee, other than nonlawyer

members, may participate in the investigation of Charges of Misconduct, provided that a member participating in such investigation may not participate in a District Committee's consideration, adjudication and disposition of such Charges of Misconduct.

(b) A District Committee shall have jurisdiction over all Charges of Misconduct filed with it against any Respondent. Venue shall not be jurisdictional, but venue shall lie in the following order of preference:

(i) when any portion of the alleged Misconduct occurred in its district; or

(ii) when the Respondent resides in its district; or

(iii) when the Respondent maintains an office in its district; or

(iv) when the address of the Respondent on record with the Virginia State Bar as the Respondent's address for licensing purposes lies within the Committee's district.

If preferred venue does not lie with any District Committee able to adjudicate the Charges of Misconduct against a Respondent, such Charges of Misconduct may be filed with and adjudicated by a District Committee designated by the Standing Committee. Objections to venue shall be deemed waived unless made within ten days of receipt by Respondent of notification of the referral to a District Committee of the Charges of Misconduct.

(c) Subject to the rules of procedure prescribed by Council, each District Committee shall have the power:

(i) to elect a chairman, vice-chairman, secretary and assistant

secretary and such other officers as it considers appropriate;

(ii) to conduct hearings and adjudicate Charges of Misconduct as provided in this Rule;

(iii) to summon and examine witnesses under oath administered by any member of the District Committee and to compel the attendance of witnesses and the production of documents necessary or material to any inquiry;

(iv) to rule on the admissibility of evidence; and

(v) to rule on motions for a change of venue and to transfer venue to another District Committee where such other District Committee would be a more appropriate forum.

Any summons or subpoena may be issued on behalf of a District Committee by any lawyer member thereof or by Bar Counsel.

(5) Preliminary Investigation and Filing of Charges of Misconduct:

(a) Bar Counsel shall conduct a preliminary investigation of any Charges of Misconduct to determine whether the same should be filed with a District Committee. Any such Charges of Misconduct shall be filed with a District Committee unless such preliminary investigation clearly reveals that the Charges of Misconduct have no basis in fact or that even if proved they would not constitute Misconduct.

When filing Charges of Misconduct with a District Committee, Bar Counsel shall notify the District Committee Chairman thereof of Bar Counsel's recommendation that the matter be investigated by a member of Bar Counsel's staff, by a District Committee member or both. The

District Committee Chairman shall promptly notify Bar Counsel of any disagreement with Bar Counsel's recommendation. If Bar Counsel and the District Committee Chairman are unable to agree, the Standing Committee or a member thereof serving as its designee, shall determine by whom the investigation is to be conducted. Thereafter, in accordance with procedural rules established by the Council, the Charges of Misconduct shall be investigated and a report thereof made to the District Committee. The District Committee shall consider the report and determine whether the Charges of Misconduct should be dismissed or whether a hearing should be held with respect to such Charges. If the Charges of Misconduct are dismissed, the District Committee Chairman or a member designated by the District Committee Chairman shall advise the complainant, the Respondent and the Bar Counsel simultaneously of the dismissal and shall furnish to them the District Committee's reasons for dismissing the Charges of Misconduct. Dismissal of charges may be conditioned upon fulfillment of terms imposed in accordance with the rules of procedure adopted by Council. Nothing herein shall be construed to prevent Bar Counsel or a District Committee from proceeding before a circuit court as provided in Section 54-74 et seq. of the Code of Virginia.

(b) Notice of Hearing: If the District Committee determines to hold a hearing, Bar Counsel shall, at least twenty-one days prior to the date fixed for the hearing, serve upon the

Respondent by certified mail a notice of the hearing. The notice shall contain a statement of the time and place designated by the District Committee for the hearing, a clear and concise statement of the alleged Misconduct and any disciplinary rules alleged to have been violated.

(c) Procedure at Hearing: The hearing shall be conducted as an adversary proceeding. The District Committee shall hear witnesses and receive exhibits. The Charges of Misconduct shall be prosecuted by Bar Counsel. The Respondent may be represented by counsel, may cause witnesses and documents to be summoned and subpoenaed by the District Committee, and may cross-examine witnesses. The testimony shall be taken and preserved, together with all exhibits (or copies thereof) received in evidence or refused by the District Committee.

(6) Determination by District Committee: At the conclusion of the hearing, if the District Committee determines that the evidence fails to show Misconduct by the Respondent, it shall dismiss the proceeding.
If the District Committee determines that the evidence shows Misconduct by the Respondent, the District Committee Chairman shall issue its determination in writing, setting forth the following:

(a) Brief findings of the facts established by the evidence;

(b) The nature of the Misconduct shown by the facts so established including any disciplinary rules violated by the Respondent; and

(c) The disposition made by the

District Committee.
The writing shall constitute the "District Committee's Determination" for purposes of further proceedings under this Rule.

(7) Disposition: Upon a finding of Misconduct a District Committee may:

(a) impose a private reprimand;

(b) offer a private reprimand with specified terms as provided in the rules of procedure adopted by Council;

(c) impose a public reprimand;

(d) offer dismissal with specified terms as provided in the rules of procedure adopted by Council; or

(e) certify the Charges of Misconduct to the Board.

Any offer under subparagraph (7)(b) or (d) above shall require written acceptance by the Respondent within ten days following service of such offer. In the event the Respondent declines or fails to comply with the recommendations of the District Committee within such time as the District Committee may have prescribed, the Committee shall reconsider the matter and dispose of the same as provided in subsection (a), (c) or (e) above.

(8) Notice to the Respondent and Bar Counsel: The District Committee Chairman by certified or registered mail, return receipt requested, shall promptly notify the Respondent and Bar Counsel of the District Committee's Determination.

(9) Notice to the Complainant: If the District Committee has dismissed the Charges of Misconduct, the District Committee Chairman by mail shall promptly and simultaneously notify the Complainant, the Respondent and Bar

Counsel of such dismissal and the factual and legal bases thereof. If the District Committee determines to issue a private or public reprimand, or to make an offer of private reprimand or dismissal upon terms, then upon expiration of the period for appeal from such private or public reprimand or upon acceptance of terms by the Respondent the District Committee Chairman shall promptly send the Complainant a copy of the District Committee's Determination. If the Respondent demands a redetermination of a reprimand as provided in this Rule, the District Committee Chairman shall promptly notify the Complainant of Respondent's demand for a hearing before the Board. If the Respondent fails to accept or comply with the terms imposed by the District Committee, the District Committee Chairman shall send the Complainant a copy of the District Committee's Determination following reconsideration of the complaint. If the District Committee determines to certify the matter to the Board, the District Committee Chairman shall mail a copy of the District Committee Determination to the Complainant simultaneously with the mailing of the District Committee Determination to the Respondent.

(10) Redetermination of Private or Public Reprimand: A Respondent as to whom a District Committee has determined to issue a private or public reprimand, within ten days after notice thereof, may demand a hearing before the Board. Demand for a hearing shall be made by written notice to the District Committee Chairman with a copy to the Clerk of the Disciplinary System and to Bar Counsel.

Upon such notice, the reprimand shall be stayed and the District Committee shall promptly certify Charges of Misconduct to the Board, which shall conduct a de novo hearing thereon and dispose of the same as provided in Subparagraph C of this rule.

(11) Issuance of Reprimand: Upon the expiration of the period for demanding redetermination of a reprimand, if such demand has not been made by the Respondent, the District Committee shall issue the reprimand to the Respondent and, if the reprimand is a public reprimand, Bar Counsel shall issue a public statement thereof as provided in the Rules of Procedure adopted by Council.

(12) Certificate to the Board: If the District Committee has elected to certify the Charges of Misconduct to the Board, it will promptly mail to the Clerk of the Disciplinary System the complete record of the District Committee proceeding. The Record shall consist of the notice of hearing, the transcript of testimony (if any), any exhibits received or refused by the District Committee, the District Committee Determination, and all briefs, memoranda or other papers filed with the District Committee by the Respondent or the Bar.

C. The Board and Procedure Before the Board - (1) Appointment: The Chief Justice of the Supreme Court shall appoint, after consultation with the Council, the members of the Board who shall be members of the Bar and twelve in number. One member shall be designated by the Chief Justice as Chairman and another as Vice-Chairman.

Members shall serve terms of three years each, except that, initially, four members shall be appointed for terms of one year, four for terms of two years, an four for terms of three years. No member shall serve more than two consecutive terms but shall be eligible for reappointment after the lapse of one or more years following expiration of the previous term.

(2) Notice of Meetings; Quorum: The Board shall meet on reasonable notice by the Chairman or the Vice-Chairman. Five members shall constitute a quorum and the action of a majority of a quorum shall constitute action of the Board.

(3) Jurisdiction: The Board shall have jurisdiction to consider:

(a) Charges of Misconduct certified to it by a Committee;

(b) Conviction of a Crime;

(c) Disability;

(d) Disbarment or suspension in another jurisdiction; and

(e) Misconduct certified to it by Bar Counsel or the chairman of a District Committee as provided in subparagraph (5)(b) hereof.

(4) Powers of the Board: The Board shall have the power:

(a) to adopt such rules and regulations not inconsistent herewith as may be convenient for the conduct of its business;

(b) On its own motion or upon request by Bar Counsel or the Respondent, to summon and examine witnesses under oath administered by any member of the Board and to compel the attendance of witnesses and the production of documents necessary or

material to any proceeding; any summons or subpoena may be issued by any member of the Board or the Clerk of the Disciplinary System and shall have the force of a summons or subpoena issued by a circuit court; and

(c) To rule on the admissibility of evidence.

(5) Procedure on Charges of Misconduct:

(a) Upon certification by a District Committee of a Charge of Misconduct, Bar Counsel shall cause to be served on the Respondent the District Committee's Determination. The Respondent may, within twenty-one days after such service:

(i) File his answer which shall be conclusively deemed to be a consent to the jurisdiction of the Board; or

(ii) File a demand that the proceedings before the Board be terminated and that further proceedings be conducted pursuant to Article 6 of Chapter 4 of Title 54 of the Code of Virginia, whereupon, further proceedings before the Board shall be terminated and Bar Counsel shall file the complaint required by Section 54-74 of the Code. After the answer has been filed, or the time has expired for either filing an answer or demanding that the proceedings be terminated, the Board shall set a time and place for hearing and shall, at least twenty-one days prior to the date fixed for the hearing, serve notice thereof upon the Respondent. The Respondent shall have the right to representation by counsel, to examine and cross-examine witnesses, and to present evidence in his own behalf. The testimony shall be taken and preserved,

together with all exhibits or copies thereof received in evidence or refused by the Board.

(b)(i) If Bar Counsel or a District Committee Chairman has reasonable cause to believe that an Attorney is engaging in Misconduct which is likely to result in injury to, or loss of property of, one or more of the Attorney's clients or any other person, and that the continued practice of law by the Attorney poses an imminent danger to the public, Bar Counsel or the District Committee Chairman may petition the Board to issue an order requiring the Attorney to appear before the Board in accordance with the procedures set forth below, for a hearing to determine whether the Misconduct has occurred and whether the imposition of immediate sanctions is reasonable and necessary.

(ii) The petition shall be under oath and shall set forth the nature of the alleged Misconduct, the factual basis for the belief that immediate action by the Board is reasonable and necessary, and any other facts which may be relevant to the Board's consideration of the matter, including any prior disciplinary record of the Attorney.

(iii) Upon receipt of the Petition, the Chairman or Vice-Chairman of the Board shall issue an order requiring the Respondent to appear before the Board not less than 14 nor more than 30 days from the date of the order for a hearing to determine whether the misconduct has occurred and the imposition of sanctions is appropriate. The Board's order shall be served on the Respondent no fewer than ten days prior to the date set for hearing.

(iv) If the Respondent, at the time the petition is received by the Board, is the subject of an order then in effect by a circuit court pursuant to Section 54-74.01 of the Code of Virginia appointing a receiver for his accounts, the Board shall issue a further order summarily suspending the license of the Respondent until the Board enters its order upon such hearing.

(v) At least five days prior to the date set for hearing, the Respondent shall either (a) file a formal answer to the petition which shall be conclusively deemed to be a consent to the jurisdiction of the board or (b) file a demand that proceedings before the board be terminated and that further proceedings be conducted pursuant to Article 6 of Chapter 4 of Title 54 of the Code of Virginia, whereupon further proceedings before the Board shall be terminated and Bar Counsel shall file a complaint under Section 54-74 of the Code. Failure to file such demand within the time prescribed herein shall be a conclusive waiver of the right to subsequently file such demand.

(vi) If proceedings continue before the Board, the conduct of the hearing shall be as provided in subsection (a) of this section 5. If proceedings continue pursuant to Section 54-74 of the Code, the court designated pursuant to that section shall conduct the hearing provided for therein not more than 60 days from the date of filing of the complaint. If any order of summary suspension has been entered, such suspension shall remain in effect until the court designated under Section 54-74 enters a final order disposing of

the issues before it.

(6) Determination by Board: If the Board determines that the evidence fails to show Misconduct, it shall dismiss the proceeding.

Upon a finding of Misconduct, the Board shall enter and serve upon the Respondent its order, setting forth:

(a) Brief findings of the facts established by the evidence;

(b) The nature of the Misconduct shown by the facts so established; and

(c) The sanction imposed, which shall be:

(i) Issuance of a private reprimand;

(ii) Issuance of a public reprimand;

(iii) Suspension of the license of the Respondent for a stated period of time not in excess of five (5) years, provided, however, that an attorney whose license has been suspended for more than one (1) year must apply for reinstatement as provided in Paragraph I, infra; or

(iv) Revocation of the Respondent's license.

If the Board finds that the Misconduct was the result of a Disability, it may consider the Disability in mitigation of any discipline imposed, and if the Board finds that the Disability exists at the time of the hearing, it shall dispose of the matter in the manner provided in Subparagraph E below. The Board may refuse to accept evidence of Disability if the Respondent has not raised the issue in his answer or has not provided to Bar Counsel at least thirty days prior to the hearing date copies of any reports of health care practitioners

which the Respondent intends to introduce in evidence.

D. Proceedings Upon Adjudication of a Crime:

(1) Summary Suspension: Whenever the Clerk of the Disciplinary System receives a certified copy of an order of any court of competent jurisdiction stating that an Attorney has been found guilty of a Crime by verdict of a judge or jury, irrespective of whether sentencing has occurred, the Board shall forthwith enter an order summarily suspending the license of the Attorney and shall forthwith serve upon the Attorney (a) a copy of the court order, (b) a copy of the Board's order, and (c) a notice fixing the time and place of a hearing to determine whether the license of the Attorney should be revoked or further suspended. The hearing shall be set not less than fourteen nor more than thirty days after the date of the Board's order. Upon written request of the Respondent, the hearing shall be continued until after sentencing has occurred, and on receipt by the Board of a certified copy of a notice of appeal from the conviction, proceedings before the Board shall, upon request of the Respondent, be continued pending disposition of such appeal. The Board may, upon request of the Respondent, hold an interim hearing and terminate such suspension during the pendency of such sentencing or appeal if it finds that such suspension , if not terminated, would be likely to exceed the discipline imposed by the Board upon a hearing on the merits of the case.

Upon presentation to the Board of a certified copy of an order setting aside

the verdict or reversing the conviction on appeal, any suspension of the license shall be automatically terminated and any revocation of the license shall be vacated, and the license shall be deemed automatically reinstated. Nothing herein shall preclude further proceedings against the Respondent upon Charges of Misconduct arising from the facts leading to such conviction.

(2) Action By the Board: If the Board shall find at the hearing that the Respondent has been found guilty of a Crime by the verdict of a judge or jury, an order shall be issued and served upon the Respondent in which the Board shall:

(a) Suspend, or continue the suspension of, the license of the Respondent for a stated period not in excess of five years; or

(b) Revoke the license of the Respondent.

E. Disability - (1) Burden of Proof: Whenever the existence of a Disability is alleged in a proceeding under this Rule for the suspension of the license of an Attorney or in mitigation of Charges of Misconduct, the burden of proving such Disability shall rest with the party asserting its existence. In proceedings to terminate a suspension for Disability, the burden of proving the termination of Disability shall be on the Attorney.

(2) Suspension for Disability: The Board shall have the Power to suspend the license of an Attorney who is under a Disability. The term of such suspension shall be indefinite, and except as provided in (6)(a) below shall be terminated only upon determination by the Board that the Disability no longer

exists. A finding of Disability shall not terminate any proceeding upon Charges of Misconduct involving the Respondent, but may be considered by the Board in mitigation as provided in Subsection C (6).

(3) Suspension upon Proof of Prior Adjudication of, or Hospitalization for, Disability. Upon receipt of a notice from the Clerk of the Disciplinary System with supporting documentary evidence that an attorney has been adjudicated by a court of competent jurisdiction to suffer from Disability, or that the Attorney has been involuntarily admitted to a hospital (as defined in Sec. 37.1-1 of the Code of Virginia) for treatment of any addiction, inebriacy, insanity or mental illness, the Board shall enter an order suspending the license of the Attorney and serve the Order of the Attorney.

(b) Suspension in Absence of Prior Adjudication of or Hospitalization for Disability. Upon receipt of notice or evidence that an ATTORNEY IS OR MAY BE SUFFERING FROM Disability and in the absence of prior adjudication of or hospitalization for Disability, Bar Counsel shall cause an investigation to be made to determine whether there is probable cause to believe that the Disability exists. If Bar Counsel determines that there is probable cause to believe that the Attorney suffers Disability, he shall file a petition with the board, which shall promptly hold a hearing to determine whether such Disability exists. A copy of the petition shall be served on the Attorney.

(4) Hearing Procedure: The Board

shall conduct a hearing to determine whether a Disability exists in the following instances:

(a) Upon petition of Bar Counsel alleging that an Attorney is under a Disability.

(b) Upon petition of an Attorney who has been suspended from practice for Disability and who alleges that the Disability no longer exists. Evidence that the Attorney is no longer hospitalized as provided in (3)(a) above shall not be conclusive to the Board's determination of the Attorney's ability to resume the practice of law.

(5) General Provisions: The following additional provisions apply to Disability hearings:

(a) Guardian Ad Litem. The notice of any hearing to determine whether an Attorney suffers from Disability shall request the Attorney to advise the Board whether he has retained counsel to represent him at the hearing. Unless the Attorney affirmatively advises the Board within ten (10) days after his receipt of the notice that he has retained such counsel, the Board shall appoint a guardian ad litem to represent the Attorney at the hearing.

(b) Examination. The Board may require the Attorney to undergo a psychiatric, physical or other medical examination by a qualified physician selected by the Board. A written report of the result of such examination along with written reports from any other physicians who have examined the Attorney, may be considered as evidence by the Board.

(6) Termination of Suspension:

(a) In cases where a suspension

for Disability is based upon an adjudication of Disability by a Court, as provided in (3)(a) above, upon receipt of documentary evidence of adjudication by a Court of competent jurisdiction that the Attorney's Disability has terminated, the board shall promptly enter an order terminating the suspension of the Attorney's license.

(b) In all other cases the Board shall hold a hearing on the issue of termination of the Disability promptly upon receipt of a request from the Attorney.

f. Disbarment or Suspension in Another Jurisdiction -- Whenever there shall be filed with the Clerk of the disciplinary System evidence that an Attorney admitted to practice in this State has been disbarred or suspended from practice in another jurisdiction and that such disciplinary action has become final, the Board shall forthwith enter an order suspending the license of the Attorney and directing the Attorney to show cause why the same sanction that was imposed in the other jurisdiction should not be imposed by the Board. The Board shall forthwith serve upon the Respondent by certified mail (a) a copy of such certificate, (b) a copy of such order, and (c) a notice fixing the time and place of a hearing to determine what action should be taken by the Board. The hearing shall be set not less than twenty-one nor more than thirty days after the date of the order. Within fourteen days of the date of mailing, the Respondent shall file a written response, which shall be confined to allegations that:

(1) The record of the proceeding in the other jurisdiction would clearly show that such proceeding was so lacking in notice or opportunity to be heard as to constitute a denial of due process; or

(2) The imposition by the Board of the same sanction upon the same proof would result in a grave injustice; or

(3) The same conduct would not be ground for disciplinary action or for the same sanction in this State.

The Respondent shall have the burden of producing the record upon which he relies to support allegations (1), (2) or (3) above, and he shall be limited at the hearing to reliance upon the allegations of his written response. Except to the extent the allegations of the Respondent's written response are established, the findings in the other jurisdiction shall be conclusive of all matters for purposes of the proceeding before the Board. If at the time fixed for hearing the Respondent has not filed a written response or shall not appear or if the Board, after hearing, shall determine that the Respondent has failed to establish the allegations of his written response, the Board shall impose the same sanction that was imposed in the other jurisdiction. If the Board shall determine that the Respondent has established the allegations of his written response, it shall, in its discretion, dismiss the proceeding or impose a lesser sanction than was imposed in the other jurisdiction. A copy of any order imposing sanction shall be served upon the Respondent by certified mail. Any such order shall be final and binding subject only to appeal

as hereinafter provided.

G. Appeal. - (1) Right: Any Respondent may appeal as a matter of right to this Court from an order of public reprimand, suspension, or disbarment.

(2) Notice of Appeal: The Respondent shall file with the Clerk of the Disciplinary System a notice of appeal and assignments of error within twenty-one days after the order of the Board is mailed to him or to his counsel. This action within the time prescribed is jurisdictional.

(3) Further Proceedings: Further proceedings shall be as provided in this Court's procedure for filing an appeal from a trial court and procedure following perfection of appeal. For the purposes of determining dates of filing, the date of filing the record with the clerk of the Supreme Court shall be deemed to be the date of the issuance of the certificate of the clerk of Supreme Court under Rule 5:23. The Executive Director of the Virginia State Bar shall immediately notify the Respondent and his counsel, if any, by certified mail, of the date on which the record is filed.

(4) Determination: This Court shall hear the case and make such determination in connection therewith as it shall deem right and proper.

(5) Office of the Attorney General: In all appeals to this Court, the Office of the Attorney General, or the Bar Counsel, if so requested by the Attorney General, shall represent the interests of the Commonwealth and its citizens as appellees.

(6) Stay Pending Appeal: Upon the

filing of a timely notice of appeal, the Supreme Court may, upon petition of the Respondent, stay the effect of an order of suspension issued by the Board during the pendency of the appeal. Any order of public reprimand shall be automatically stayed during the pendency of an appeal therefrom. No stay shall be granted in cases where the Respondent's license to practice law has been revoked by the order of the Board.

H. Resignation. - Any Attorney may at any time surrender his license by tendering his resignation in writing to the clerk of the Supreme Court, but any resignation tendered by an Attorney at a time when charges are pending against him before the Board or a District Committee shall be deemed an admission that such charges are true. This admission shall not be deemed an admission in any proceeding except one relating to the status of the Attorney as a member of the Virginia State Bar. The Supreme Court will by order accept such resignation and revoke the license of such Attorney. Upon tendering his resignation to the Supreme Court, the Attorney shall immediately cease the practice of law and by certified mail shall forthwith give notice of his resignation from the bar of the Supreme Court to all clients for whom he is currently handling matters and to all opposing attorneys and the presiding judges in pending litigation. He shall make immediate appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client.

I. Reinstatement. - Any Attorney whose license has been suspended or

revoked may petition this Court for reinstatement, setting forth in the petition the reasons supporting the reinstatement. This Court may deny the petition or refer it to the Board for recommendation. Upon such reference, the Board shall hold a hearing and file its recommendation, together with the record before it, with the Clerk of this Court. Final action will be taken by this Court.

No license to practice law shall be granted to any former attorney whose license was suspended for more than one year unless the attorney demonstrates to the court (1) that he or she has attended eight hours of continuing legal education for every year or fraction thereof that the attorney's license has been suspended; (2) that the attorney has taken and passed the Multistate Professional Responsibility Examination since imposition of discipline; and (3) that the attorney has reimbursed the bar's Clients' Security Fund for any sums of money it may have paid as a result of the attorney's misconduct.

In addition to meeting the foregoing requirements, an attorney whose license to practice law was revoked must also show by clear and convincing evidence that he or she is a person of honest demeanor and good moral character and that he or she possesses the requisite fitness to practice law.

Nothing contained in this Section I shall affect the right of an Attorney whose license has been suspended or revoked to apply to the Governor for relief pursuant to the provisions of Section 2.1-51 of the Code of Virginia.

J. General Provisions. - (1)

Duties of Disbarred or Suspended Attorney: Any Attorney who is disbarred or suspended shall forthwith give notice, by certified mail, of his disbarment or suspension to all clients for whom he is currently handling matters and to all opposing attorneys and the presiding judges in pending litigation. He shall make immediate appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client.

(2) Authority of Judge: Every Judge shall have authority to take such action as may be necessary or appropriate to protect the interests of clients of any Attorney who is disbarred or suspended.

(3) Enforcement: Every Circuit Court shall have power to enforce any order, summons or subpoena issued by the Board or a District Committee and to adjudge disobedience thereof as contempt.

(4) Pre-hearing Procedure: There shall be no pre-hearing or discovery proceedings. Depositions may be taken only when witnesses are unavailable and only then in accordance with the Rules of this Court.

(5) Confidentiality: Except as otherwise provided herein, all proceedings before a District Committee or the Board shall be confidential, and shall be privileged from discovery, but the order of a District Committee relating to public reprimand and the orders of the Board relating to public reprimand, suspension and revocation shall be public and shall be certified to the Clerk of this Court and to the

Clerk of the Circuit Court and the Clerk of each General District Court in each locality in this Commonwealth where the Attorney maintains an office, if he maintains one, and, if he is a member of the bar of another state, to the appropriate official of that state. Upon the written request of an Attorney, however, the fact that charges have been brought against him, and the nature and disposition thereof, or that charges have not been brought against him (but no other facts) may be revealed to any official, bar association officer, or agency of another jurisdiction having responsibility with respect to admission to its bar. Furthermore, whenever the District Committee discovers evidence of criminal activity on the part of the Attorney, the District Committee, through its Chairman, shall forward such evidence to the appropriate Commonwealth's Attorney or United States Attorney. In the event an Attorney who has been the subject of a private reprimand is subsequently found by the Board to be guilty of Misconduct, the facts and circumstances giving rise to such private reprimand and the fact that a private reprimand was issued may be disclosed (a) to the Board prior to the imposition of any sanction and (b) by the Board in its findings of fact set forth in its order.

(6) Jurisdiction of Courts: Nothing contained in this Rule 13 shall be so interpreted as to eliminate the jurisdiction of the courts of this Commonwealth to deal with the discipline of attorneys-at-law as provided by law.

(7) Whenever any notice or other writing directed to the Respondent is

required or permitted under this Rule, such notice or other writing shall be deemed effective and served when mailed by certified or registered mail, return receipt requested, to the Respondent at the Respondent's address on record for licensing purposes with the Bar.

(8) Standard of Proof: The standard of proof to be applied by the Board or by a District Committee in any proceeding under this Paragraph shall be that of clear and convincing evidence.

(9) Disqualification of Bar Counsel: In the event of disqualification or recusal of bar counsel in any proceeding before a district committee, the board, or a three-judge court the charge of misconduct shall be prosecuted by (i) a district committee member designated by the district committee chairman if the proceeding is before a district committee, or (ii) the Attorney General or his designee if the proceeding is before the board or a three-judge court.

VIRGINIA STATE BAR COUNCIL

RULES OF DISCIPLINARY PROCEDURE

FOR

VSB STAFF AND DISTRICT COMMITTEES

IV. MISCELLANEOUS

D. Substantial Compliance with Procedural Requirements

The actions required by these Rules of Disciplinary Procedure are procedural in nature and not substantive. Substantial compliance herewith shall be deemed sufficient. Noncompliance with any one or more of such

actions shall not of itself be grounds for dismissing proceedings against a Respondent. Respondent may introduce evidence of such noncompliance and present argument that such non-compliance so prejudiced his rights as to deny him a constitutional right of due process.

REVISED

DATE: 12/1/88

CONSTITUTION OF THE UNITED STATES

(AMENDMENT V)

(Rights of Accused in Criminal Proceedings)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE UNITED STATES

(AMENDMENT VI)

(Right to Speedy Trial, Witnesses, etc.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

CONSTITUTION OF THE UNITED STATES

(AMENDMENT XIV)

Section 1.

(Citizen Rights Not to Be Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 90-1570

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

ELTON EUGENE GUNTER,

Petitioner,

v.

VIRGINIA STATE BAR, *ex rel,*
THE SEVENTH DISTRICT COMMITTEE and
BILLY J. TISINGER, ESQUIRE,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Virginia State Bar initiated a disciplinary proceeding against Petitioner after receiving a complaint of misconduct from a member of the Virginia State Bar Disciplinary Board. Therefore, the complaint was referred to a circuit court as permitted by Va. Code § 54.1-3935, rather than to an administrative proceeding before a Virginia State Bar disciplinary committee.

Petitioner objected to the fact that his case was to be heard by a circuit court, and he filed various motions seeking to remand the case to the District Committee and to discover the reason that the case was referred to a circuit court. He argued that the decision to proceed pursuant to § 54.1-3935 was a departure from the procedures set forth in Paragraph 13 of the Rules of the Supreme Court of Virginia and a violation of his right to due process and equal protection of the law. He did not raise a Sixth Amendment claim either in the trial court or before the Supreme Court of Virginia.

Petitioner's motions were denied because Paragraph 13(B)(5)(a) provides that disciplinary cases may be heard in a circuit court and because discovery is not required in disciplinary proceedings.

SUMMARY OF THE ARGUMENT

The decision below merely follows established precedent and does not conflict with the decisions of other courts. The Petition also relies upon facts that are not part of the record and claims that were never presented to the

state courts. Further, review of this case on certiorari is not warranted because the facts are unique and unlikely to recur.

Under Virginia law, a complaint of unethical conduct against an attorney may be heard either in a circuit court or in administrative proceedings conducted by the Virginia State Bar. While the two procedures may differ somewhat, both procedures provide the attorney with the due process protections to which he is entitled.

The Virginia Supreme Court relied upon established precedent in holding that the decision to hear a case in a circuit court rather than before an administrative committee of the Virginia State Bar does not violate an attorney's due process or equal protection rights. The attorney has no due process right to conduct discovery or to demand a preliminary hearing before his due process hearing.

REASONS FOR DENYING THE WRIT

I. The Judgment Below Is Based Upon Established Precedent And Does Not Conflict With The Decisions Of Other Courts

The decision of the Supreme Court of Virginia does not conflict with any decision of another state court of last resort or of a federal court of appeals. In fact, the decision faithfully follows well settled principles established by this Court. The decision in this case merely reaffirms that an attorney who is the subject of a disciplinary hearing is entitled to notice "of the nature of the charge referred against him and be given an opportunity to answer." (App. p.9.) This doctrine was established by

this Court in *In re Ruffalo*, 390 U.S. 544 (1968) *reh. denied*, 391 U.S. 961 (1968), and was followed by the court below.

Further, the opinion of the Supreme Court of Virginia follows precedent of this Court in holding that the Petitioner did not have a due process right to conduct discovery and in upholding the facial constitutionality of Virginia's binary disciplinary system. (App. pp.8-12.) The remainder of the opinion construes a Virginia statute and rule of court that allow the Virginia State Bar to file disciplinary charges either as administrative proceedings or before a circuit court. In short, the decision of the Supreme Court of Virginia merely applies settled principles in a routine attorney disciplinary case, and review by this Court is not warranted.

II. The Petition Relies Upon Facts That Are Not Part Of The Record

Petitioner relies upon an incomplete and inaccurate rendition of a telephone conversation to support the proposition that his case has been the only disciplinary case to be referred to a court rather than to a committee of the Virginia State Bar. (Pet. p. i.) His reliance on evidence that is not part of the record demonstrates not only that this Court must resolve a factual controversy, but also that it must do so on an incomplete record. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Furthermore, even if Petitioner's statement were correct, it merely illustrates that the questions raised in the Petition turn on the peculiar facts of this case and are of interest only to the parties to it. If these facts have never

arisen before, they are not likely to recur again and this case is too narrow to warrant review by this Court on certiorari.

III. This Court Lacks Jurisdiction To Hear Petitioner's Sixth Amendment Claim

Petitioner argues that he was deprived of his right to effective assistance of counsel because he was denied the right to conduct a hearing before his due process disciplinary hearing. This claim was not raised before either the trial court or the Supreme Court of Virginia. In *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969), this Court stated that "[i]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

IV. The Procedure Employed In This Case Did Not Violate Petitioner's Right To Due Process Of Law

In Virginia, the authority to discipline attorneys was originally vested in the circuit courts pursuant to Va. Code § 54.1-3935. The Supreme Court of Virginia created a separate system for disciplining attorneys "to develop a procedure which was more accessible to the public and more conducive to expeditious and effective management. . . . " Rosenfield, *A Brief Review of Virginia's Revised Disciplinary System*, Virginia Lawyer, September, 1990, p.30. A disciplinary proceeding can now be brought in the circuit courts pursuant to statute, or before the Bar pursuant to the Rules. Either the attorney or Bar Counsel may elect to have the case heard in the circuit court. Paragraphs 13(B)(5)(a) and 13(C)(5)(a)(ii).

The procedures employed in the circuit court differ from the procedures employed in administrative proceedings before the Virginia State Bar. However, both procedures provide an attorney with notice of the charges against him and an opportunity to answer those charges. Both procedures afford the attorney the opportunity to cross-examine the witnesses against him, testify in his own behalf, and compel the attendance of witnesses.

Petitioner does not argue that he was not given notice of the charges against him or an opportunity to answer those charges. He merely claims that he was not given the opportunity for a hearing in the forum of his preference. Petitioner has no due process right to demand a hearing before the Virginia State Bar Disciplinary Board rather than before a circuit court.

V. The Procedure Employed In This Case Did Not Violate Petitioner's Right To Equal Protection Of The Law

Petitioner argues that because the Virginia State Bar normally elects to proceed before the Disciplinary Board, it cannot elect to proceed before a circuit court without violating the attorney's right to equal protection of the law. To establish a violation of his equal protection rights, Petitioner must show that similarly situated persons are subject to disparate treatment and that this disparate treatment has no rational basis. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 489 (1977).

There was a rational basis for presenting this case to the circuit court. The person who made the complaint against Petitioner was a member of the Disciplinary

Board. Serious due process questions could be presented by conducting a hearing before a panel containing a member who originally supplied the evidence of misconduct. *See, e.g., In re Murchison*, 349 U.S. 133, 137 (1955) ("Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."). Even if the complainant recused himself, there could be a public perception of impropriety when fellow Board members heard the case.

However, the issue is not whether the decision to resort to a court trial was mandated by the due process clause. The issue is whether the decision was rational rather than arbitrary and capricious. It is rational to file a disciplinary case in court rather than before the Disciplinary Board when a member of the Board made the complaint against the attorney.

Moreover, it is the fact that the complainant was a member of the Disciplinary Board that establishes that Petitioner is not similarly situated with other attorneys facing disciplinary proceedings. The due process considerations involved in this case do not arise when the complaint is made by a member of the public or another member of the Bar. Thus, Petitioner can not show that he is similarly situated with other attorneys facing disciplinary charges.

VI. The Due Process Clause Does Not Require Such Pre-Hearing Procedures As Discovery Or Preliminary Hearings On An Attorney's Defenses To Charges Of Misconduct

Petitioner complains that he was deprived of the opportunity to take discovery of the reason for the

referral of his case to the circuit court. Petitioner had the right to present any evidence he chose *at* his due process hearing in order to prove his claim that his equal protection and due process rights were being violated. However, he had no due process right to conduct discovery before that hearing. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case. . . . ").

Petitioner argues that the denial of his motion to remand the case to a district committee, without a hearing, violated his right to due process of law. The motion sets forth in detail the facts supporting the motion. Bar Counsel's right to proceed in a circuit court pursuant to Va. Code § 54.1-3935 is explicitly recognized in Paragraph 13(B)(5)(a) of the Rules of the Supreme Court of Virginia. Thus, the motion was correctly denied as a matter of law. Petitioner has no due process right to a preliminary hearing before his due process hearing in order to produce evidence in support of a motion to dismiss.

Furthermore, the reason that Bar Counsel chose to proceed pursuant to § 54.1-3935 was a matter of record. A member of the Disciplinary Board filed the complaint against Mr. Gunter. Thus, there was no reason to give him the opportunity to produce evidence that his case was treated differently than other disciplinary cases. If he was treated differently, it was because his case was different in that a member of the Disciplinary Board made the complaint against him.

CONCLUSION

For these reasons, the Virginia State Bar, Respondent herein, prays that the petition for writ of certiorari be denied.

Respectfully submitted,

Virginia State Bar, *ex rel*,
The Seventh District Committee

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(3)

RECORD NO. 90-1570

IN THE

Supreme Court of the United States

October Term, 1990

ELTON EUGENE GUNTER,

Petitioner,

v.

VIRGINIA STATE BAR, ex rel, THE SEVENTH DISTRICT COMMITTEE and BILLY J. TISINGER, ESQUIRE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY OF PETITIONER TO BRIEF IN OPPPOSITION

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF

Petitioner submits this Reply to the Opposition Brief of the Respondents.

1. The Brief in Opposition of the Respondents, in essence, concedes that the rights of the Petitioner were violated with regard to equal protection of the law and due process of law.

2. At page 2 of the Opposition Brief, the Respondents state inter alia:

> "Further, review of this case on certiorari is not warranted because the facts are unique and unlikely to recur."

3. This statement is consistent with the concession given to Petitioner's counsel by a representative of Respondents that this case has no equal in the annals of disciplinary proceedings before the Virginia State Bar. By describing this

case as "unique" and "unlikely to recur", it is obvious that the Respondents are conceding that there is no parallel situation where any other lawyer who was subject to disciplinary proceedings was deprived of a hearing before a district committee.

4. The Respondents seem to equate the hearing before the Circuit Court as the same which would have been granted before the Seventh District Committee. Such, of course, is not correct, since the Circuit Court proceedings are public, whereas as the Seventh District Committee proceedings would have been confidential and private, and the persons hearing it would not have been Circuit Court Judges, but, rather, members of the Seventh District Committee.

5. The Respondents make the

incredible assertion that because of the fact that Billy J. Tisinger, Esquire, a member of the Virginia State Bar Disciplinary Board was the Complainant, that it would look inappropriate for the Seventh District Committee to grant a hearing even if Mr. Tisinger had recused himself if the matter was ultimately certified to the Disciplinary Board by the District Committee. This Court can take judicial notice of the fact that frequently Justices of this Court recuse themselves in particular matters, and that is true of virtually every tribunal in the country. The recusal of Mr. Tisinger would in no way have impacted upon the right or duty of the Seventh District Committee to grant a hearing. As a matter of fact, it was the only fair and proper thing to do, consistent with the Fourteenth Amendment

of the United States Constitution.

6. With respect to discovery, while it is true that in normal cases a member of the bar who is subject to discipline is not afforded discovery, the unusual circumstances of this case warranted discovery due to the fact that, after about two years of unexplained delay, the Seventh District Committee suddenly decided that it would not grant a hearing to the Petitioner. No reason was advanced, and, in order to proceed intelligently and properly before the Circuit Court, Petitioner was entitled to discovery as to why he was deprived of his hearing before the Seventh District Committee and for the other pertinent and critical information he was seeking.

76. Petitioner maintains that the Virginia State Bar cannot discriminate

against one of its members with respect to its proceedings before a district committee or the Disciplinary Board by referring the matter to a Circuit Court, which effectively eliminates one hearing to which the attorney is entitled by the Rules of the Supreme Court of Virginia and constitutionally.

8. The Respondents have not contested the fact that they can find no other case where a member of the bar was deprived of a proceeding before a district committee. We submit that this ipso facto was a violation of Petitioner's equal protection and due process rights under the Fourteenth Amendment to the United States Constitution.

9. The disparate treatment has no rational basis herein, since the absurd reason for denying the hearing, according

to the Respondents, was that Mr. Tisinger was a member of the Disciplinary Board (not the District Committee) and as such the entire Committee was automatically recused from granting a hearing, albeit after a two-year unexplained hiatus.

10. If the reasoning of the Respondents is correct; then, if any Justice of this Court finds it necessary to recuse herself or himself, the entire Court would be barred from hearing the case. That would be true of every tribunal one can imagine. It is obvious that the mere statement of this premise is enough to expose its fatuous reasoning.

11. The citation by the Respondents of Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977), is puzzling since that case dealt with an Ohio statute which prohibited workers from collecting

unemployment benefits when the unemployment stemmed from labor disputes, other than lockouts, at factories owned or operated by employers by which the worker was last employed. We can see no logical reason why that case is controlling herein. If it had any relevance at all, it would seem that the Petitioner was "locked-out" of his hearing before the District Committee.

12. In the case of Regents of University of Cal. v. Bakke, 98 S.Ct. 2733, 57 L.Ed.2d 750, an illogical and irrational type of discrimination applied to one member of a group was struck down as contrary to the equal protection clause of the United States Constitution.

13. At page 6 of their brief, the Respondents again state that they acted "rationally" by filing a disciplinary case

against the Petitioner in the Circuit Court, rather than before the Disciplinary Board, because a member of the Board made the complaint. There is no rationality to this decision since every other attorney who is subject to discipline is granted a hearing before a district committee and his choice of a second hearing before the Disciplinary Board or a Circuit Court, if such committee confirms the charge(s).

14. In Quinn v. Millsap, 109 S.Ct. 2324, 105 L.Ed.2d 74 (1989), this Court ruled that irrational and invidious discrimination violates the equal protection clause of the United States Constitution.

15. In its brief, page 7, by citing Weatherford v. Bursey, 429 U.S. 545, 559 (1977), the Respondents are in effect conceding that the instant proceeding is

a "criminal case".

16. We, on behalf of Petitioner, have maintained that this is a quasi-criminal case, and consequently the full panoply of due process rights in such a case should be granted to the Petitioner, which includes the type of discovery requested herein due to the fact that the Seventh District Committee inexplicably, after a two-year hiatus, suddenly referred the matter to the Winchester Circuit Court without any logical reason whatsoever.

17. Finally, we submit that by depriving the Petitioner of hearings with respect to certain aspects of the disciplinary proceedings, such as his Motion for Discovery and his objections to bypassing the Seventh District Committee, Petitioner was deprived, to some extent, of the effective assistance of the lawyers

he had hired. Unless they could appear and argue for him, they could not properly acquit themselves in the manner in which a client is entitled. Such is a violation of the Sixth Amendment of the United States Constitution which is made applicable to the states in the Fourteenth Amendment, and consequently, this too, is a basis for the constitutional violations which are alleged by Petitioner herein.

CONCLUSION

The opposition of Respondents is not based upon cogent or logical reasoning; therefore, in essence, they are not contesting the essential bases of the Petitioner in his allegations of having been deprived of equal protection of the law and due process of the law. Accordingly, the Petition for Certiorari should be granted.

Respectfully submitted.

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